Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

ROBERT K. GRAY,

Petitioner,

v.

ST. MARTIN'S PRESS, INC.,
and
SUSAN TRENTO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the Court adopt a new liability standard in cases in which the plaintiff is a limited purpose public figure?

Should the Court include a temporal component in the limited purpose public figure analysis under which a person may lose limited purpose public figure status by the passage of time?

In this libel action in which Petitioner claims Respondents defamed him by publishing in their non-fiction book The Power House that Petitioner faked his closeness with President Reagan and other senior Reagan Administration officials ("Statement (b)"), have the District Court and the Court of Appeals for the First Circuit reached decisions which conflict with this Court's decision in Milkovich v. Lorain Journal Co. when these lower courts focused on only isolated words, ignored the tenor and context of Statement (b) and failed to perform any multi-factored analysis in determining that Statement (b) was non-actionable "opinion?"

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Robert K. Gray. He is an individual and any corporations to which he may be affiliated are not parties to this case.

Respondents

Respondents are St. Martin's Press, Inc. and Susan B. Trento.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 221 F.3d 243 (1st Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a - 19a. The District Court ordered the entry of final judgment on June 25, 1999, which is printed in Appendix B at 20a to 21a. The May 19, 1999 Order of the District Court is published at 1999 WL 813909 (D.N.H.) and included in Appendix C at 22a - 31a. The March 5, 1998 Order of the District Court for the District of New Hampshire is unpublished. It is included in the Appendix at Appendix D at 32a - 48a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its Opinion on August 2, 2000. This Petition for Writ of Certiorari is filed within 90 days of the August 2, 2000 entry of judgment. Petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This defamation action concerns a non-fiction book entitled The Power House, Robert Keith Gray and the Selling of Access and Influence in Washington ("the Book"), which was written by Respondent Susan B. Trento ("Trento") and, in July 1992, published by Respondent St. Martin's Press, Inc. ("St. Martin's"). In his June 2, 1995 Complaint, Petitioner Robert K. Gray ("Gray") brought a libel claim in U.S. District Court for the District of New Hampshire against St. Martin's and Trento, claiming that at least eight (8) statements in the Book were defamatory. See Joint Appendix submitted to Court of Appeals for the First Circuit, at 39-40 (Complaint, ¶ 11 (a)-(h)). Following a two week jury trial, the jury returned a verdict for St. Martin's and Trento on June 22, 1999. The District Court entered judgment on June 25, 1999, and Gray filed a timely Notice of Appeal with the Court of Appeals for the First Circuit on July 22, 1999.

On appeal, Gray argued that the District Court erred in several pretrial rulings.[1] Gray contends that the District Court erred in its May 19, 1999 Order by, inter alia, finding that (1) Gray was a limited purpose public figure, and that (2) Gray had not met his corresponding burden of establishing that Respondents acted with actual malice in publishing Statement (c).[2] Statement (c), which is a quote from a

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[1] In this Petition, Gray addresses only those District Court rulings, as affirmed by the Court of Appeals for the First Circuit, to which Gray now asks this Court to grant certiorari.

[2] In its May 19, 1999 Order, the District Court granted Respondents' February 16, 1999 Motion for Partial Summary Judgment as to Gray's status as a public figure and ruled that Gray was a limited purpose public figure (and hence Gray was required

disgruntled ex-employee of Gray named Barry Zorthian, reads:

> "'I think there's a degree of venality on the part of [Gray] and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of overcharging.'" The Power House, p. 165.

Gray presented evidence to both the District Court and the Court of Appeals for the First Circuit that would enable a reasonable trier of fact to conclude Trento and St. Martin's each acted with actual malice in publishing Statement (c). Despite this evidence, the District Court dismissed Statement (c), reasoning "defendants have demonstrated that no reasonable trier of fact could conclude that defendants acted with 'actual malice' or with reckless disregard for whether the statement was false." Appendix C, at 29a. The Court of Appeals for the First Circuit affirmed, holding that "[t]here is no point in our going through this evidence piece by piece because we agree with the district court's assessment." Appendix A, at 13a.

Gray also contended on appeal that the District Court erred by finding in its March 5, 1998 Order (Appendix D)

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to prove that Respondents acted with actual malice). See Appendix C, at 27a. Additionally, in ruling on Respondents' separate February 16, 1999 summary judgment motion on the issue of actual malice, the District Court dismissed Statement (c). Id., at 29a.

that Statement (b) was a non-actionable opinion. Gray's Appellate Brief, at 13-20.[3] Statement (b) reads:

> "A senior Gray and Company executive insisted that Gray's closeness to the President and others was often faked. 'He completely faked his closeness with a number of senior administration officials.'" The Power House, p. 156.

The District Court dismissed Statement (b) by relying on the analysis in Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992) cert. denied 504 U.S. 974, 112 S.Ct. 2942 (1992) that the adjective "fake" was unprovable while conducting no analysis of the tenor or context of Statement (b) in the Book. Appendix D, at 46a. The Court of Appeals for the First Circuit affirmed, by focusing on the words "fake" and "closeness" and concluding that "the statement is protected opinion." Appendix A, at 5a-7a. Like the District Court, the Court of Appeals for the First Circuit acknowledged that whether Statement (b) was a protected opinion depended very much on its context, yet provided no meaningful analysis of either the tenor or context of Statement (b). Id.[4]

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[3] On March 5, 1998, the District Court partially granted St. Martin's June 24, 1997 Motion for Summary Judgment by ruling that the Statements found at ¶11 (b), (f) and (h) ("Statements (b), (f) and (h)") of the Complaint were non-actionable "opinions." Gray now appeals the finding of the District Court, as affirmed by the Court of Appeals for the First Circuit, as to Statement (b).

[4] In analyzing Statement (b), the Court of Appeals for the First Circuit only made the following passing reference to the Book "[T]he book made quite clear that Gray did have contacts at the

ARGUMENT FOR GRANTING THE WRIT

ARGUMENT 1

The Court should adopt a new liability standard in cases in which the plaintiff is a limited purpose public figure.

Respondents quote "a former Gray & Company senior vice president" on page 165 of The Power House (Barry Zorthian) as stating that he thought 'there is a degree of venality on the part of Bob and lack of integrity which always took me aback. A lot of it he would justify as being a business man, but there was very little real basic principle and an awful lot, to me, of overcharging.'" (Statement (c)). The District Court granted summary judgment on this statement finding Gray to be both a limited purpose public figure and further finding that no reasonable jury could find that the charge was made by the Respondents with actual malice (emphasis added). The Court of Appeals affirmed.

Assuming the District Court correctly determined that Gray was a limited purpose public figure, this Petitioner was immediately confronted with an impressive roadblock - the liability standard originating in New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964). This actual malice standard has evolved into a barrier nearly impossible to overcome. In New York Times, this Court adopted the

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highest levels; the word 'fake' was used to imply that Gray was exaggerating his 'closeness.'" Appendix A, at 6a. The Court of Appeals for the First Circuit did not, however, analyze Statement (b) by looking beyond the words that comprised Statement (b) or by examining Statement (b)'s tenor, its larger context in the Book, or the context of the Book itself.

actual malice standard to assure "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people ...." Id. at 269, 84 S.Ct. at 720 (internal quotations omitted).

While discussing the folly of allowing the defense of truth, the New York Times Court noted that critics of "official conduct" would censor themselves rather than run the risk of unlimited libel judgments. Id. at 279, 84 S.Ct. at 725. The policies justifying New York Times are now essentially unarguable, including the high price put on robust public comment and criticism of public officials and the civic value found in preserving such criticism.

Shortly after New York Times, the actual malice rule was extended to public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967). Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) determined that the position of the plaintiff rather than the type of speech was key in determining the burden of proof placed on plaintiff. See Sheldon W. Halpern, *Of Libel, Language and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C.L. Rev. 273 (1990).

The evidence before the District Court on Statement (c) was compelling and should have been submitted to the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257,

106 S.Ct. 2505, 2514 (1986).[5] Neither the District Court nor the Court of Appeals agreed. The evidence included:

- The fact that the source had been fired by Gray & Company which the author knew when she interviewed the source;

- The fact that the source unsuccessfully brought a discrimination charge against Gray & Company as a result of his termination which the author knew when she interviewed the source (Barry Zorthian);

- The fact that the source expressed his bias against Gray to the author during the course of her interview;

- The fact that the source confirmed at his deposition that his statement about Gray's lack of integrity resulted from the manner in which he was terminated;

- The fact that the source had no personal or professional background which made him knowledgeable about business billing practices and the source had no involvement or direct knowledge about the billing practices of Gray & Company in particular, the subject of his quote;

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[5] Gray stands by his position, which he argued before both the District Court and the Court of Appeals for the First Circuit, that the cumulative evidence in this case satisfies the onerous actual malice test set forth in New York Times and establishes that Trento and St. Martin's each acted with actual malice in publishing Statement (c).

- The fact that the author acknowledged her preference to seek out disgruntled witnesses to help her make her case against the plaintiff;

- The fact that the author disregarded a statement by a person in a position to know that he knew of no overcharging complaints and considered the plaintiff to be a man of integrity, citing the exculpatory statement as "a waste of time";

- The fact that the author failed to interview James Jennings and Charles Crawford, two people whom she knew to be key witnesses and knowledgeable about Gray & Company's billing practices;

- The fact that the author failed to interview other key insiders at Gray & Company;

- The fact that the publisher knew from the outset that the source was a disgruntled former employee;

- The fact that the publisher through Gray's counsel knew that the source could not be trusted;

- The fact that the publisher through Gray's counsel knew that Trento should not be trusted because she had failed to interview sources who would have accurate details about Gray & Company;

- The fact that the publisher's own staff criticized the author's sketchy research and knew of Gray's ongoing expressed concerns about the author's inaccuracies; and

- The fact that the editors of the publisher made no effort to verify Zorthian's defamatory statement.

On such evidence, the Court of Appeals has held, under the current state of the law of defamation, that Gray cannot make his case to the jury.

The constitutionalization of the law of defamation has created a body of law which is confusing and difficult to administer. This body of law has encouraged the violation of the principles upon which New York Times v. Sullivan was based. The malice standard has evolved to the point where its invocation virtually insures a libel defendant will prevail and a defamed limited purpose public figure will fail. Thus the media has the ability to publish inaccurate stories "without being subject to effective remedial measures." Philip L. Judy, *The First Amendment Watchdog Has A Flea Problem*, 26 Cap. U. L. Rev. 541, 581 (1997). The media's publication of inaccurate material, encouraged by the actual malice standard, can only lead to the erosion of public confidence in the media.

The Constitution does not value falsehood. Gertz v. Robert Welch, Inc., at 339, 94 S.Ct at 3007. The current actual malice standard encourages bad journalism.

For instance,

- It is safer to cover people and not issues. Judy, supra, at 551. Because the status of the plaintiff and not the issue involved determines the level of protection, media reports focusing on a public figure or official must receive a higher level of protection regardless of the subject matter reported. See Monitor Patriot Co. v. Roy, 401 U.S. 265, 273, 91 S.Ct. 621, 626 (1971). In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675 (1979), a public figure was not involved and hence the actual malice standard did not apply despite the fact the publication concerned wasteful spending of public funds. Judy, supra at 552. As Justice Brennan foresaw in Rosenbloom v. Metromedia, 403 U.S. 29, 48, 91 S.Ct. 1811, 1822 (1971), creation of a public/private figure distinction "could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." Casual review of the media reflects the fact that the pursuit of public scandal has replaced discussion of issues of public or general concern as the touchstone of modern journalism. To the extent the evolved constitutionalization of the law of defamation has encouraged this trend, the public good is not served.

- The actual malice standard encourages sloppy reporting.

1. The actual malice standard encourages reporters to avoid review or verification of the information contained in their reports. Ironically it is safer to avoid review of a story then to seek out an editor's comment. A reporter adopting the latter course runs the risk of editorial comment questioning the accuracy of the story or suggestions for further investigation. Thoughts and comments of reporters and editors must be open to judicial inquiry on the issue of actual malice, Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635 (1979) and as inspection of reporters' offices and files has been allowed, Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970 (1978), prudence requires shoddy research.

Certainly public policy favors a media which informs the public. Practices encouraged by the actual malice rule undercut this goal.

2. The actual malice standard encourages a reporter to not investigate a story. Robert Gray's case offers a stunning example.

Apparently, the author, Susan Trento, purposely avoided speaking to witnesses whom she believed would offer evidence contrary to the biased report she had received from Barry Zorthian. By pursuing such shoddy journalistic practices, she succeeded in preventing the issue from ever being heard by the jury. The salutary goal of New York Times v. Sullivan that the public be informed by the media so that intelligent choices can be made in this democracy is not achieved through such shoddy journalistic practices.

- The actual malice standard and the constitutionalization of the defamation process exalts opinion over fact. Hence a reporter will

> tend to avoid representations of fact in stories and resort to exaggeration and rhetoric. A statement dismissed as an "opinion" in this case is argued elsewhere in this Petition.

The problem is clear. The constitutionalization of the defamation process and the adoption of the actual malice standard in the case of limited purpose public figures has led to a body of law which runs directly contrary to the principles of New York Times v. Sullivan. The solution is to adopt a different standard, at least in limited purpose public figure cases. The standard has been suggested elsewhere. Injury to reputation should be compensated consistent with First Amendment principles. The First Amendment as well as the interests of damaged defamation victims can be accommodated with the adoption of a professional negligence standard. Halperin, supra at 318 et seq. The adoption of such a standard would still require the proof of fault by the injured plaintiff, and would allow defamation victims at least a chance of vindication. Further, the effect on the press would be salutary, removing the incentives for sloppy journalism which exist under the present system and restoring public confidence in the press.

ARGUMENT 2

This Court should decide the important and unsettled federal question of whether the determination of a defamation plaintiff's limited purpose public figure status should include a temporal analysis by finding that a person may lose limited purpose public figure status by the passage of time.

Gray argued both to the District Court and on appeal that he no longer retained any limited purpose public figure status at the time of the Book's 1992 publication, and noted that it remains an unsettled issue with this Court whether a libel plaintiff such as Gray can lose limited public figure status through the passage of time. See Gray's Appellate Brief, at 28-29. This Court should now avail itself of the opportunity to settle this issue and hold, consistent with the concurrence in Wolston v. Reader's Digest Association, Inc., that a temporal component is relevant and should be included in any limited purpose public figure analysis. 443 U.S. 157, 170-171, 99 S.Ct. 2701, 2709 (1979). It is imperative that the Court now decide this issue because lower federal courts have developed and followed an untenable standard that a limited purpose public figure always retains that status as to the public controversy at issue. This standard is inconsistent with this Court's concurring opinion in Wolston. It results in an undue expansion of First Amendment protection to defamation defendants at the expense of defamation plaintiffs who, by being permanently relegated to limited purpose public figure status and thus required to prove actual malice, often are unable to ever recover for the loss of their good names.

Since Gertz, this Court and lower federal courts have struggled with the limited purpose public figure definition. See Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 443 (S.D. Ga. 1976) aff'd 580 F.2d 859 (5th Cir. 1978) ("Defining public figures is much like trying to nail a jellyfish to the wall"). Lower federal courts have developed different standards to determine who constitutes a limited purpose public figure. Compare Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980) cert. denied 449 U.S. 898, 101 S.Ct. 266 (1980) with Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 and 1556 (4th Cir. 1994).

The Court of Appeals for the Fourth Circuit has recognized the perishability of limited purpose public figure status, requiring that a plaintiff retain limited purpose public figure status at the time of the libel. See e.g. Foretich, 37 F.3d at 1553 and 1556; Fitzgerald v. Penthouse International, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) cert. denied. 460 U.S. 1024, 103 S.Ct. 1277 (1983). The vast majority of federal courts, however, have developed and followed an arbitrary standard that once a person is deemed a limited purpose public figure he or she eternally retains that status for purposes of the same public controversy. See e.g. Partington v. Bugliosi, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995); Street v. NBC, 645 F.2d 1227, 1235 (6th Cir. 1981), cert. granted 454 U.S. 815, 102 S.Ct. 91 and cert. dismissed 454 U.S. 1095, 102 S.Ct. 667. This standard has been criticized. See Pendleton v. City of Haverill, 156 F.3d 57, 70 (1st Cir. 1998) ("To be sure, there may be a temporal dimension to any limited purpose public figure analysis. Intuitively, one should not become fair game for eternity merely by interjecting oneself into the debate of the moment"); Alan Kaminsky, Defamation Law: Once a Public Figure Always a Public Figure?, 10 Hofstra L. Rev. 803 (1982).

By relegating a defamation plaintiff to permanent public figure status and thus curtailing the plaintiff's ability to recover by requiring the plaintiff to demonstrate actual malice, the lower federal courts are not following any precedent of this Court. This Court has not yet decided whether a limited purpose public figure permanently retains that status. In Wolston, 443 U.S. at 167, 99 S.Ct. at 2707 fn 7, this Court declined on the facts of that case to then decide "whether and when an individual who is a public figure may lose that status by the passage of time." However, in concurring in the result reached by the Wolston majority, Justices Blackmun and Marshall held that temporal factors are relevant in deciding a person's limited purpose public figure status:

> "The passage of time ... often will be relevant in deciding whether a person possesses these two public figure characteristics. First, a lapse of years between a controversial event and a libelous utterance may diminish the defamed party's access to the means of counterargument.... Second, the passage of time may diminish the 'risk of public scrutiny' that a putative public figure may fairly be said to have assumed."

Id., at 170 - 171, 99 S.Ct. at 2709. The Wolston concurrence noted that although this analysis which includes a temporal component implies that one may be a public figure for purposes of contemporaneous reporting of a controversial event but not for purposes of historical commentary on the same event, "this result ... does no violence to First Amendment values." Id., at 171, 99 S.Ct. at 2709. Justice Blackmun's and Justice Marshall's harmonizing a temporal component in a limited purpose public analysis and the First

Amendment is particularly pertinent in cases such as this one: "A reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources. A historian writing sub specie aeternitatis has both the time for reflection and the opportunity to investigate the veracity of the pronouncements he makes." Id.

The time has come for this Court to squarely decide whether a limited purpose public figure always remains such. This is a question which has significant Constitutional ramifications. The limited purpose public figure test announced by Gertz imposes on persons who are deemed limited purpose public figures the almost insurmountable barrier of proving actual malice. See Gertz, 418 U.S. at 342, 94 S.Ct. at 3008. ([New York Times "actual malice" standard] exacts a ... high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test"). The rigorous actual malice standard already forecloses otherwise deserving libel plaintiffs from being able to recover for being defamed. Id. A defamation plaintiff who may have been a limited purpose public figure at some point in his life should not be "fair game for eternity" and required to prove a defendant acted with actual malice when, years later, the defendant defames the plaintiff. Pendleton, 156 F.3d at 70.

In this case, the Book primarily concerns lobbying in Washington in the early to mid 1980s during the Reagan administration. The Book focuses on this same time frame in its alleged reporting of Gray and his company (Gray and Co.) which Petitioner sold in 1986. Even if Gray was a limited purpose public figure during the early to mid 1980s, he should not be burdened with this status and required to prove

Respondents acted with actual malice when they defamed him in 1992.

By deciding that a temporal component should be included in a limited purpose public figure analysis, this Court will resolve an unsettled area of law and fairly and constitutionally balance the First Amendment concerns which this Court has outlined in Gertz with a defamation victim's ability to recover for being defamed.

ARGUMENT 3

Statement (b) that Gray faked his closeness with President Reagan and senior Reagan administration officials is actionable because it contains statements of fact that are objectively verifiable. By limiting their analysis of Statement (b) to the words "fake" and "closeness" and by viewing these words in isolation, the District Court and the Court of Appeals for the First Circuit failed to take into account Statement (b)'s tenor and context as required by this Court's holding in Milkovich v. Lorain Journal Co. The lower courts' limited analysis of the important federal question of whether a defamatory statement is an actionable opinion conflicts with Milkovich and the multi-factored analysis previously used by the Court of Appeals for the First Circuit and other Appeals Courts.

Any statement that might be labeled an "opinion" does not automatically receive First Amendment protection. Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, 110 S.Ct.

2695, 2705 (1990). A defamatory statement is actionable if it contains an objectively verifiable assertion. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997). Even if a statement is couched as an opinion, it is still actionable if it "presents or implies the existence of facts which are capable of being proven true or false..." Levinsky's, Inc., at 127; see Milkovich, at 18-19, 110 S.Ct. at 2705-2706.

In Milkovich, this Court declined to "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, at 18, 110 C.Ct. at 2705. Instead, the Court noted that expressions of "opinion" often may imply an assertion of objective fact. Id. The Court analyzed the nine sentences at issue in Milkovich, which appeared in the text of a sports column, in their broader context and found:

> "This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression."

Id., at 21, 110 S.Ct. at 2707. In focusing on more than just the literal words of the defamatory statements in analyzing the important question of whether the statements were nonactionable opinion, the Milkovich Court expressly recognized society's strong interest in redressing attacks on reputation. Id., at 22, 110 S.Ct. at 2707.[6]

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[6] '"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our

Lower courts, including the Court of Appeals for the First Circuit, also have applied a multi-factor test to determine whether a statement is an actionable opinion. Levinsky's, Inc., at 131 (recognizing that defamatory statement at issue could not be viewed in isolation and context was an important aspect of the Milkovich inquiry); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 ("Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion"); Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) cert. denied 471 U.S. 1127, 105 S.Ct. 2662 (1985).[7] Under such an analysis, a court cannot consider only the definitions of the isolated words that make up a statement. A court also must examine whether the challenged speech contains "loose, figurative or hyperbolic language that would

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basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. *** "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Milkovich, at 22-23, 110 S.Ct. at 2708 (quoting Justice Stewart's concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676 (1966)).

[7] The Ollman court analyzed (1) the common usage or meaning of the specific language of the challenged statement itself; (2) the statement's verifiability – is the statement capable of being objectively characterized as true or false?; (3) the full context of the statement, e.g. the entire article or column and the unchallenged language surrounding the defamatory statement; and (4) the broader context or setting in which the statement appears, i.e. the type of writing at issue and what it may signal to the reader. Ollman, at 979.

negate the impression" that a factual statement was made, and evaluate the tenor of the speaker's statement and the overall context in which it was given. Milkovich, at 21, 110 S.Ct. at 2706.

Here, although the District Court recognized a multi-factored analysis (which had been used by the Court of Appeals for the First Circuit), both the lower courts parsed Statement (b) to isolate two words contained in it, and ignored Statement (b)'s overall tenor and context. Appendix A, at 5a-7a; Appendix D, at 46a. The District Court and the Court of Appeals for the First Circuit isolated the word "fake" and then construed it as an adjective that could have a variety of meanings depending on its context. This ignores the fact that the word "fake" appears as a verb in Statement (b) and its meaning as a verb is easily ascertainable. It is objectively verifiable whether Gray faked his close relationship with President Reagan and top Reagan officials by simply interviewing Gray, the Reagans and Reagan officials. Either Gray had a close relationship with these people or he did not. The lower courts' focus on the words "fake" and "closeness" ignores the reality that these words, as used in Statement (b), would have a readily ascertainable meaning to anyone used to the commonplace way people communicate with one another.

The District Court and the Court of Appeals for the First Circuit did not consider the overall tenor of Statement (b) and the context in which it was made. Statement (b) on its face is a matter-of-fact statement devoid of hyperbole or rhetoric. It appears in Chapter 8 of the Book, which details facts concerning the start up of Gray &Co. and the social aspects of the business. Trento and St. Martin's themselves hold out the Book as a meticulously researched piece of journalism and not an opinion piece. Gray's Appellate Brief, at 17-20.

There is nothing in the literal wording of Statement (b), or in its overall tenor or context, that supports the conclusion that Statement (b) is an opinion as opposed to a fact-based statement. The lower courts analyzed the question of whether Statement (b) is an opinion by simply analyzing the meaning of the words contained in the statement in isolation. This is not what Milkovich envisions, or what the multi-factored test previously used by the Court of Appeals for the First Circuit and other Courts of Appeals requires. This Court should not allow lower courts to conduct such an abbreviated analysis to determine whether a statement is a protected opinion because to do so would conflict with this Court's Milkovich decision and the multi-factored analysis accepted in the lower courts.

CONCLUSION

For these reasons, this Court should grant Gray's Petition for Certiorari and decide these important questions concerning federal defamation law.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed August 2, 2000]

Nos. 99-1891 and 99-1892

ROBERT K. GRAY,
Plaintiff, Appellant/ Cross-Appellee,

v.

ST. MARTIN'S PRESS, INC. and SUSAN TRENTO,
Defendants, Appellees/ Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Steven J. McAuliff, U.S. District Judge]

Before: Boudin, Stahl and Lynch, Circuit Judges.

OPINION

BOUDIN, Circuit Judge. Robert K. Gray was for many years active in Republican politics and a leading figure

in public relations in Washington, D.C. He served in the Eisenhower administration in various roles (e.g., Secretary to the Cabinet), worked in the 1980 Reagan-Bush presidential campaign and served between 1961 and 1981 as the head of the Washington office of, and eventually as vice chairman of, Hill and Knowlton, a major public relations and lobbying firm. He founded his own firm in 1981, sold it to Hill and Knowlton in 1986, and served for a period as a member of the board of directors and chairman of a division of the latter.

In July 1992, St. Martin's Press, Inc., published a book by Susan Trento, entitled The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington. Focusing on Gray's career, the book sought to show the influence of powerful and well-connected lobbyists on the federal government. In June 1995, Gray brought suit both against St. Martin's Press and Trento in the federal district court in New Hampshire, claiming that eight separate statements made in the book were defamatory. The eight statements are set forth in an appendix to this opinion.

After two years of discovery, St. Martin's Press moved for summary judgment. On March 5, 1998, the district court granted partial summary judgment to St. Martin's Press, ruling that three of the eight statements -- (designated (b), (f), and (h)) -- were non-actionable statements of opinion. More discovery was conducted and both defendants filed a second summary judgment motion. On May 19, 1999, the district court ruled that Gray was a "limited purpose public figure," requiring Gray to show "actual malice" in order to prevail. The district court granted summary judgment for defendants as to one statement

(statement (c)), finding that there was no basis for the jury to find actual malice.

The trial on the remaining four statements began on June 7, 1999. On June 22, 1999, the jury returned special verdicts in favor of St. Martin's and Trento. As to each of the four remaining statements in issue ((a), (d), (e), and (g)), the jury found that Gray had not proved that the defendants had published to third parties statements that were false and defamatory as to Gray; separately, the jury found that Gray failed to prove actual malice by either defendant as to any of the four statements.

Gray has now appealed. In this court he contests the dismissal before trial of four of the statements, a discovery ruling upholding a claim of privilege asserted by Trento that pertains to one of the statements considered by the jury, and the denial before trial of a motion by Gray to amend his complaint to add twenty additional statements to the eight already charged. We consider the issues in this order, applying the standard of review pertinent to the issue in question.

Under state law, defendants in this case would be liable for damages for libel if, as a result of the failure to exercise reasonable care, they published false and defamatory facts about the plaintiff to a third party, assuming that no valid privilege applies.[1] Independent Mechanical Contractors,

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[1] The district court initially applied New Hampshire law in ruling on the defendants' motions for summary judgment, but just before trial was persuaded that Virginia law applies to this case. The parties to this appeal do not contend that any issue on

Inc. v. Gordon T. Burke & Sons, Inc., 138 N.H. 110, 118 (N.H. 1993); The Gazette, Inc. v. Harris, 229 Va. 1, 8, 15 (1985), cert. denied, 472 U.S. 1032 (1985). See generally Restatement (Second) of Torts § 558 (1977). However, the Supreme Court has read the First Amendment, made binding on the states through the Fourteenth, to impose additional limitations in defamation cases, whether or not they are also part of state law. Two of these limitations are significant in this case--one dealing with scienter and the other with opinion.

Pertinently, the Court has held that a "public figure" may recover only if the false and defamatory statement was made with "actual malice," meaning (in the Supreme Court's non-literal usage) either that defendant knew that the statement was false or showed a "reckless disregard" as to its truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 335-37 (1974). A "public figure" may be one of such fame as to be so in all contexts (e.g., the President) or a "limited-purpose public figure" as to a particular episode or subject; in the latter case, only the statements about the person in that context require a showing of actual malice. Gertz, 418 U.S. at 351-52; Pendleton v. City of Haverhill, 156 F.3d 57, 67 & n.7 (1st Cir. 1998).

The Court has also held that only statements that present or imply the existence of facts that can be proven true or false are actionable under state defamation law. Milkovich

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this appeal turns on differences between New Hampshire and Virginia law.

v. Lorain Journal Co., 497 U.S. 1, 18-20 (1990). But to say "I think" is not enough to turn fact into opinion, Milkovich, 497 U.S. at 18-19, where what is supposedly "thought" is, or implies, a proposition of fact, id.; Levinsky's v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997). Rather, the cases are likely to protect a statement as "opinion" where it involves expressions of personal judgment, especially as the judgments become more vague and subjective in character. See Levinsky's, 127 F.3d at 130 (store was "trashy"). As Chief Judge Posner put the matter in Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993):

> [I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

On this appeal, Gray first questions the district court's March 5, 1998, ruling that statements (b), (f), and (h) are not actionable because they are not factual statements capable of being proven false. The determination was made on summary judgment and in any event the courts treat the issue of labeling a statement as verifiable fact or as opinion as one ordinarily decided by judges as a matter of law. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-11 (1984). Thus from either vantage, our review is de novo. As it happens, we agree with the district court's reasoning as well as its result and so treat this issue briefly.

Statement (b) is the view, attributed to an unnamed Gray and Company senior executive, that Gray's "closeness to the President [Reagan] and others was often faked. 'He

completely faked his closeness with a number of senior administration officials.'" There are various vantages from which the statement could be attacked as false (e.g., that no such view was expressed by the unnamed executive), but the bite here is in the claim that "closeness" was "faked" and Gray's position is that he could show at trial that he was quite close to President Reagan and other senior officials and was not "faking" these relationships.

Whether calling something a "fake" is or is not protected opinion depends very much on what is meant and therefore on context. To say that a dollar bill is a fake would, in most situations (but perhaps not all), be taken to mean that it was a counterfeit; and to say that the defendant was knowingly passing a fake dollar bill would surely be actionable, if false. At the other extreme, where there were two productions of Phantom of the Opera, and the defendant called one of them "fake" and "phony," this court held that the adjectives were subjective aesthetic judgments protected as opinion. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir.), cert. denied, 504 U.S. 974 (1992).

In this case, Gray might have a claim if defendants had said that Gray claimed to know President Reagan or other high officials but did not in fact know them; whether or not he knew them is an objective fact. However, the book made quite clear that Gray did have contacts at the highest levels; the word "fake" was used to imply that Gray was exaggerating his "closeness." This is just the kind of subjective judgment that is only minimally about "what happened" but expresses instead a vague and subjective

characterization of what happened. As we read the case law, the statement is protected opinion.

Statement (f) is in essence several different statements: in it Trento asserted that a number of Washington lobbyists said that Gray and Company "ultimately failed because it offered very little real substance." Gray's quarrel is not with the claim that lobbyists (quite possibly competitors) had expressed such views but with the assertions that the company had "failed" and offered "little real substance." The latter judgment, where the product is an intangible service like lobbying and criteria for success are debatable, is surely one of opinion so we direct our attention to the charge that Gray and Company "failed."

If the book had said or even implied that Gray and Company went bankrupt or did not make a profit, these would be statements of fact that could be proved true or false. Instead, the book made clear that in 1986 Gray sold his company to JWT Group, Inc., which made the company part of its subsidiary, Hill and Knowlton, for about $16 million, of which Gray himself got at least $9 million (the purchase price had been $21 million but the buyer withheld about $4.6 million to cover possible liabilities). Gray does not dispute that the figures are given in the book and those figures make clear that Gray's company did not fail in any absolute sense.

Indeed, in explaining that Gray and Company "failed," Trento said that the sale was "profitable" but it "shattered" Gray's dream of owning the world's largest public communications firm. Gray does not challenge the latter statement; recall that he left Hill and Knowlton to found Gray and Company as an independent enterprise to compete with

Hill and Knowlton. Some might think it a success, rather than a failure, that his former employer found him competitive and competent enough to buy him out for millions and place him on its board of directors; but what is "success" in a situation like this one is very much a matter of opinion.

The next statement, designated (h), reads as follows:

> Robert Crowley believed that "Casey may have asked Gray to take on these controversial clients--for the very purpose of spying on them." If that were so it would explain why Gray considered countries like Libya, and took clients like Angola.

Robert Crowley was a former senior CIA official and William Casey was the CIA director in the early to mid-1980s. Once again, Gray does not dispute that Crowley may have so believed but he does challenge the balance of the statements.

Interestingly, the first disputed proposition--that Casey may have asked Gray to spy--is not necessarily protected as to defendants even if they were merely describing Crowley's view. The reason, which is one of policy rather than strict logic, is that it would otherwise be too easy for a writer or publisher to defame freely by repeating the defamation of others and defending it as simply an accurate report of what someone else had said. Cianci v. New Times Publ'g Co., 639 F.2d 54, 60-61 (2d Cir. 1980) (Friendly, J.); Cepeda v. Cowles Magazines & Broad., Inc., 328 F.2d 869, 871 (9th Cir.), cert. denied, 379 U.S. 844 (1964); Restatement (Second) of Torts § 578. Thus, the first issue is whether

Crowley's speculation is actionable once it is attributed to the defendants.

Statement (h), by its terms, links the possible purpose to spy to Casey, not Gray; but the second sentence, seemingly a separate speculation by defendants, suggests that Gray may have acted on this request. Defendants say that to spy for one's country is laudable, not defamatory. Whether a statement is capable of a defamatory meaning is an issue of law for the court, Restatement (Second) of Torts § 614(1); Harkaway v. Boston Herald Traveler Corp., 418 F.2d 56, 58 (1st Cir. 1969), and thus one we would review de novo; but the factfinder must ultimately decide whether a statement like the one here, reasonably capable of both a defamatory and non-defamatory meaning, was in fact understood as defamatory by its recipients.[2]

We think that the statement's implication of spying on clients is capable of bearing a defamatory meaning--it could easily harm Gray in dealing with clients--and that a reasonable jury could have found the statement in question defamatory. See Restatement (Second) of Torts § 559 ("A communication is defamatory if it tends so to harm the reputation of another

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[2] Restatement (Second) of Torts § 614(2) & cmt. d ("The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient."); Perk v. Vector Resources Group, Ltd., 253 Va. 310, 316 (1997) (statement must be sufficiently defamatory on its face before it is sent to the jury); Thomson v. Cash, 119 N.H. 371, 374 (1979) ("Because the words are susceptible of more than one meaning, whether they were used in the defamatory sense is a question of fact for the jury.").

as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."); Thomson, 119 N.H. at 373 (to be defamatory, a statement "must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority") (internal quotation marks omitted); Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8 (1954) (a statement "which imputes to a business or professional man conduct which tends to injure him in his business or profession" is actionable as libel per se).

To determine if the Crowley statement is shielded because it is conditional ("may have") is a more difficult question. Here, the statement may be protected "opinion" not because it is vague or judgmental but because it is speculative. The test, admittedly a very crude one, is whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation. Levin v. McPhee, 119 F.3d 189, 197 (2d Cir. 1997); Restatement (Second) of Torts § 566, comment (c) at 173. The former is protected as opinion; the latter is taken as an indirect assertion of truth.

Like the district judge, we see nothing that suggests that Crowley or the defendants were relying upon undisclosed facts. Crowley's own view is couched as a belief as to what "may have" happened. The defendants add a further supporting fact that Gray "considered countries like Libya, and took clients like Angola"; but Gray does not dispute that this is so, and where the underlying facts are disclosed, it becomes even more clear that the writer or publisher is merely speculating ("if so") about the inference. Restatement

(Second) of Torts § 566, at 174 ill. 5 ("A says to B about C, a city official: 'He and his wife took a trip on city business a month ago and he added her expenses in as a part of his own.' B responds: 'If he did that he is really a thief.' B's expression of opinion does not assert by implication any defamatory facts, and he is not liable to C for defamation.").

The last statement of the four statements disposed of before trial--statement (c)--quotes a former "Gray and Company senior vice president" as saying that "there's a degree of venality on the part of [Gray] and lack of integrity which always took me aback" and "very little real basic principle and an awful lot, to me, of over charging." During discovery, the defendants produced a transcript of Trento's interview with Barry Zorthian, a former Senior Vice President at Gray and Company, as the source of this statement. The district court granted summary judgment as to this statement because it found that Gray was a limited-purpose public figure with respect to lobbying and that no reasonable jury could find that the charge was made by the defendants with actual malice.

On appeal, Gray first disputes the limited-purpose public figure label. This is treated as an issue of law to be resolved by the district judge and reviewed de novo by us. Pendleton v. City of Haverhill, 156 F.3d 57, 68 (1st Cir. 1998). We agree with the district court that, prior to and continuing up to the book's publication--which (to avoid bootstrapping) is the pertinent time frame, Bruno & Stillman, Inc. v. Globe Newspaper, Inc., 633 F.2d 583, 591 (1st Cir. 1980)--a public controversy existed as to the methods and influence of lobbyists in Washington. This was amply evidenced by materials submitted to the district court showing

that from the early 1980s onward there has been a tide of concern and criticism about Washington lobbying.

The record also shows that Gray was a central figure in this controversy, being identified as one of the best-known of the high-level Washington public relations experts, an emblematic figure, and a self-professed defender against attacks on lobbying. Indeed, Gray's lobbying and in particular billing practices were themselves the subject of comment and criticism in mainstream publications like Time, Newsweek, the Washington Post and the New Republic. This does not show that he behaved improperly as a lobbyist or overbilled his clients. It does mean that, in the complex equation for liability laid down by the Supreme Court, Gray needed to show actual malice by clear and convincing evidence. Gertz, 418 U.S. at 351-52; Pendleton, 156 F.3d at 67 & n.7.[3]

In most cases, as in this one, the plaintiff does not have any evidence of actual malice in the literal sense but, as already noted, recklessness suffices. New York Times, 376 U.S. at 279-80; Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). Recklessness is a jury issue so long as the plaintiff at the summary judgment stage produces evidence

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[3] Gray also argues that the statements were not "germane" to any controversy over lobbyists and that he was not a limited purpose public figure by 1992 when the book was published. We think that the statements are germane to the controversy over lobbying, and the record shows numerous articles concerning Gray, his company, and Hill and Knowlton published between 1986 and 1992.

that would allow a reasonable jury to find the defendants reckless by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Recklessness, in this context, can be shown by proving "that the defendant actually had a 'high degree of awareness of . . . probably falsity,'" Harte-Hanks Communs., Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)), but mere negligence in conducting an investigation or weighing the evidence is not enough. Harte-Hanks Communs., 491 U.S. at 688; Masson, 501 U.S. at 510.

The defendants assert, and the plaintiff does not dispute, that actual malice in this case must be shown separately as to each defendant. But cf. Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253 (1974) (referring to vicarious liability). With respect to Trento, she relied not only on Zorthian but also on several other sources. They, too, had connections with Gray and Company and their statements tended to back up Zorthian's position. Against Trento's multiple sources, Gray counters that Zorthian had an axe to grind (he had parted ways with Gray and later sued him); that few of Trento's sources had much knowledge of the billing side of Gray's business; and that Trento failed to publish one other source's statement that he had "never heard" about charges of overbilling or to interview others who would have denied such overcharging.

There is no point in our going through this evidence piece by piece since we agree with the district court's assessment. Prejudice or limited knowledge on the part of a source may suggest caution but does not preclude reliance; the fact that one witness had "never heard" about the charges

counts for little; and while refusing to seek out decisive witnesses may be a mark of recklessness in some circumstances, Trento already had multiple sources and was under no obligation to exhaust every possible witness before winding up her investigation. Even assuming she was careless and reached a mistaken conclusion, that is not enough for actual malice.

Less need be said about St. Martin's. It apparently had some doubts about the rigor of Trento's book proposal. But the proposal was followed by more than two years of research and there is no evidence that St. Martin's employees doubted the accuracy of Trento's final product. It is true that Gray protested to St. Martin's prior to publication that some of the statements were untrue. However, apart from the fact that in this original protest statement (c) was not specifically identified as false, simple denials by the subject are commonplace and, absent more, are normally not enough to premise a finding of actual malice. Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 120-21 (2d Cir.), cert. denied, 434 U.S. 1002 (1977).

Gray's next claim of error on appeal is that the district court erred in upholding a claim of press privilege during the discovery process. Specifically, Trento declined to reveal the name of her confidential source for statement (g), which reads: "One Gray and Company executive in a position to know said that Gray and Company was making payments to [Duke] Zeller." According to the book, Duke Zeller had previously worked for Gray and at the time in question was the Director of Communications for the Teamsters Union, a lucrative client of Gray's company. The apparent implication

is that Gray made secret payments to Zeller in order to retain the Teamsters account.

The magistrate judge, later sustained by the district judge, upheld Trento's objection on the grounds that New Hampshire recognized a qualified confidential source privilege for reporters, State v. Siel, 122 N.H. 254, 259-60 (1982); Downing v. Monitor Publ'g Co., Inc., 120 N.H. 383, 386-87 (1980), that one requirement to overcome the privilege was to show that the applicant had made all reasonable efforts to obtain the identity of the confidential source by other reasonable means, and that this requirement had not been satisfied by Gray. On appeal, Gray argues that the district court misread New Hampshire privilege law, which both sides now assume to govern the question, and that in any event it was error to find that Gray had not satisfied the requirement.

New Hampshire law on the privilege in question, an issue for de novo review, is not a model of clarity; and, while the "failure to satisfy" finding would be reversed only for clear error or abuse of discretion, we have some initial sympathy for Gray's claim that he did all he could to satisfy the requirement of exhausting other means. And if Gray were found to have exhausted all reasonable means of identifying the source and Trento still refused to reveal her source, Gray would have been entitled to a presumption that no source existed. Downing, 120 N.H. at 387. This could have helped Gray persuade the jury that Trento acted with actual malice in making the payoff charge.

The problem for Gray is that however the matter stood at the time of the privilege ruling, the jury returned a verdict as to statement (g) that rested on two alternative grounds: one

was lack of actual malice but the other was Gray's failure (in the jury's view) to prove that the statement was false and defamatory. Defendants say that the verdict thus rested safely on a ground independent of the no-malice finding. Gray, who has not independently attacked the jury's alternative ground, has not provided any very cogent answer to this claim, beyond saying rather tersely that if the privilege had been overridden, Trento had still baulked, and the jury been told that therefore it could presume that the source did not exist, then the jury might have thought the statement false.

It is hard to see why this is so. Obviously, there was far better direct evidence available--such as Gray's own testimony--as to whether the payoff occurred; indeed, on this issue the source's statement was inadmissible hearsay as to the truth of the charge. Nor is there all that much basis to doubt that some source did exist, whether reliable or otherwise; Trento produced redacted notes of her conversation with the source and Gray himself got some mileage out of an argument that this portion of Trento's interview was not taped like the rest of the interview with the confidential source.

Gray also says that while Trento preserved the claim of privilege, St. Martin's never asserted the privilege so the district court had to have erred in upholding the claim as it did. St. Martin's agrees that it did not assert the privilege but argues, as it did in the district court, that it did not know the name of the source and therefore needed no privilege in order to withhold it. Gray responds that in previous court papers St. Martin's never affirmatively stated that it had not been told the name of the confidential source. But Gray himself does not allege that St. Martin's does actually know the identity of the source, and without evidence to contradict St.

Martin's assertion in its brief that it does not know the identity of the source, Gray's argument does not undermine St. Martin's commonsense position.

Gray's final argument on appeal, properly placed last, is that the district court erred in refusing to grant Gray leave to amend his complaint to add 20 additional statements from the book now alleged to be defamatory. As earlier noted, the complaint was filed in June 1995; and the motion to amend was made three years later, after extensive proceedings including discovery. The district court found the motion untimely and unduly prejudicial.

We find no abuse of discretion. Grant v. News Group Boston, Inc., 55 F.3d 1, 5 (1st Cir. 1995). It is enough to say that although leave to amend is to be "freely given," Fed. R. Civ. P. 15(a), Gray had the book for six years before he moved to amend and at the outset of the litigation could have easily decided which charges he believed to be false. The district court amply explained its reasons for finding that under the circumstances there was undue delay and prejudice.

The judgment is affirmed. The conditional cross-appeal filed by St. Martin's Press and Susan Trento is dismissed as moot.

ADDENDUM

a. "As others were cleaning out their desks, looking for jobs, briefing their successors, and preparing to leave the White House, Gray was busy dictating his

memoirs to his White House secretary." The Power House, p. 53.

b. "A senior Gray and Company executive insisted that Gray's closeness to the President and others was often faked. 'He completely faked his closeness with a number of senior administration officials.'" The Power House, p. 156.

c. "'I think there's a degree of venality on the part of Bob and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of over charging.'" The Power House, p. 165.

d. "' . . . at Gray and Company he [Mr. Gray] stage-managed impressive-sounding calls. A reporter would walk in and he would instruct his executive assistant to come in and announce that there was a call from the White House. Totally fabricated. Absolutely. They would come in and they would say, 'Mr. Gray, Mr. Meese is on the phone,' and he would pick up a dead line or a line that was set up by the executive assistant, carry on a conversation of four or five short rapid sentences as though he was in constant communication and hang up. And then, of course, the reporters, dazzled, would then report that a White House phone call came in,' explained one Gray and Company executive." The Power House, p. 167-8.

e. "And the Gray and Company employees in Spain were to be convinced that the office was used as a money

laundering operation for the Reagan administration's private intelligence network." The Power House, p. 273.

f. "In the end, several Washington lobbyists feel that Gray and Company ultimately failed because it offered very little real substance." The Power House, p. 323.

g. "One Gray and Company executive in a position to know said that Gray and Company was making payments to Zeller." The Power House, p. 202.

h. "Robert Crowley believed that 'Casey may have asked Gray to take on these controversial clients--for the very purpose of spying on them.' If that were so it would explain why Gray considered countries like Libya, and took clients like Angola." The Power House, p. 260.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Filed June 25, 1999]

No. 1:95-cv-00285-M

Gray	)
	)
v.	)
	)
St. Martin's Press	)
	)

JUDGMENT

JUDGMENT is hereby entered in accordance with the orders dated May 19, 1999, and March 5, 1998, by U.S. District Judge Steven J. McAuliffe and with the jury verdict entered on June 22, 1999. (Signed by Clerk James R. Starr)

By the Court,

/s/_____
James R. Starr, Clerk

Date: June 25, 1999
cc:
James G. Walker, Esq.
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Cletus P. Lyman, Esq.
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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

[Filed May 19, 1999]

No. 95-285-M

Robert K. Gray, *Plaintiff*	)
v.	)
St. Martin's Press, Inc. and Susan Trento, *Defendants*.	)

ORDER

Robert Gray brings this action seeking damages for five allegedly defamatory statements contained in The Power House, Robert Keith Gray and the Selling of Access and Influence in Washington ("The Power House"), a book authored by Susan Trento and published by St. Martin's Press. The book discusses how members of lobbying and public relations firms influence federal government operations and focuses on Gray as one of the most powerful and well-connected members of that group.

Pending before the court are two motions for summary judgment filed by defendants. In the first, defendants assert that plaintiff is a public figure and must, therefore, demonstrate that they acted with "actual malice" in order to prevail on his defamation claims. In the second, defendants assert that they are entitled to judgment as a matter of law with regard to each of the five allegedly defamatory statements in suit. On April 20, 1999, the court conducted a hearing, at which both sides presented argument on the pending motions. The parties also submitted legal memoranda and volumes of exhibits in support of their respective positions.

Discussion

A. Plaintiff is a Limited Public Figure.

Plaintiff is, at least in Washington, D.C., and nationally in governmental and lobbying circles, both successful and well-known. See, e.g., Affidavit of Robert K. Gray submitted in support of motion for enlargement of time for discovery (dated September 27, 1995), at para. 3 ("I have a national reputation in the area of public relations."). Defendants point out that he has also been the subject of a television documentary and the topic of (or, at a minimum, discussed in) several hundred newspaper and magazine articles. Thus, the only real question before the court concerning plaintiff's status is whether he is a "general purpose public figure" or a "limited public figure."

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court recognized a distinction between these two types of public figures:

> Some [plaintiffs] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id., at 345. More recently, this court (Devine, J.) addressed the legal concepts of "general purpose public figures" and "limited public figures," observing that:

> The designation "public figure" may rest on two alternative bases. First, in some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. Second, persons of lesser fame may nonetheless qualify as limited public figures if they "thrust themselves to the forefront of particular public controversies." Such limited public figures are subject to the "actual malice" standard only for defamation arising out of the public controversy into which they have thrust themselves.

Fagin v. Kelly, 978 F.Supp. 420, 426 (D.N.H. 1997) (citations omitted).

In the wake of the Supreme Court's opinion in Gertz, supra, the Court of Appeals for the District of Columbia Circuit summarized the factors that ought to be considered

when determining whether a particular person is a general purpose public figure.

> A court must first ask whether the plaintiff is a public figure for all purposes. Gertz, as noted above, held that a plaintiff could be found to be a general public figure only after a clear showing "of general fame or notoriety in the community, and pervasive involvement in the affairs of society. . . ." 418 U.S. at 352. He must have assumed a "role of especial prominence in the affairs of society. . ." Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976). Accord, Wolston v. Reader's Digest Association, 443 U.S. 157, 165 (1979). In other words, a general public figure is a well-known "celebrity," his name a "household word." The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.

Waldbaum v. Fairchild Publications, Inc., 627, F.2d 1287, 1294 (D.C. Cir. 1980).

On the record presently before it, the court cannot conclude that defendants have shown, as a matter of law, that plaintiff is a general purpose public figure. The record does not support the conclusion that plaintiff was a "celebrity" or that his name was a "household word." To the contrary, as plaintiff notes, several editors and other employees at St. Martin's Press who actually worked on the publication of The

Power House admitted at their depositions that, prior to their involvement with the book, they had never heard of Robert Keith Gray. Nothing presented suggests that the public – in the District of Columbia or nationally – was better informed or more aware of Mr. Gray's general involvement in the affairs of society. Thus, while plaintiff may be extraordinarily well known in certain Washington, D.C., circles, particularly with regard to his ability to influence public opinion and provide his clients with coveted access to powerful men and women in American politics, defendants have failed to establish that he attained that degree of notoriety or celebrity usually associated with a "general purpose public figure."

It is, however, equally clear that plaintiff has attained the status of "limited public figure." As the Court of Appeals for the Eleventh Circuit has recognized:

> The proper standards for determining whether plaintiffs are limited public figures are best set forth in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), ... Under the Waldbaum analysis, the court must (1) isolate the public controversy, (2) examine the plaintiffs' involvement in the controversy, and (3) determine whether "the alleged defamation [was] germane to the plaintiffs' participation in the controversy." Id., at 1297.

Silvester v. American Broadcasting Companies, Inc., 839 F.2d 1491, 1494 (11th Cir. 1988). Here, the "public controversy" relates to familiar and often discussed public issues – the influence of, and access provided to political

figures by, powerful Washington, D.C., lobbyists. And, there can be little doubt that plaintiff, one of the more powerful, influential, and successful lobbyists in Washington, qualifies as a central figure in that controversy. Finally, notwithstanding plaintiff's efforts to narrowly circumscribe the scope of the "public controversy" into which he thrust himself, each of the alleged defamatory statements set forth in The Power House relates directly to plaintiff's lobbying activities, his access to powerful and influential Washington "insiders," and his demonstrated ability to shape public opinion on various issues of public concern. Accordingly, the court concludes that plaintiff is a limited purpose public figure as to each of the statements at issue in this case.

B. The Five Remaining Statements in Suit.

As to each of the five remaining statements at issue in this case, defendants assert that plaintiff cannot prove, by clear and convincing evidence, that they published the statements with "actual malice." In order to prevail, plaintiff must demonstrate that defendants published the statements "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). "Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of [her] publication, or acted with a high degree of awareness of . . . probable falsity." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (citations and internal quotation marks omitted).

The five statements contained in The Power House at issue in this case are:

Statement A: "As others were cleaning out their desks, looking for jobs, briefing their successors, and preparing to leave the White House, Gray was busy dictating his memoirs to his White House Secretary." The Power House, p. 53.

Statement C: "I think there's a degree of venality on the part of Bob and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of overcharging." The Power House, p. 165.

Statement D: "'. . . at Gray and Company [Robert Gray] stage-managed impressive-sounding calls. A reporter would walk in and he would instruct his executive assistant to come in and announce that there was a call from the White House. Totally fabricated. Absolutely. They would come in and they would say, 'Mr. Gray, Mr. Meese is on the phone,' and he would pick up a dead line or a line that was set up by the executive assistant, carry on a conversation of four or five short rapid sentences as though he was in constant communication and hang up. And then, of course, the reporters, dazzled, would then report that a White House phone call came in,' explained one Gray and Company executive." The Power House, p. 167-68.

Statement E: "And the Gray and Company employees in Spain were to be convinced that the office was used as a money laundering operation for the Reagan administration's private intelligence network." The Power House, p. 273.

Statement G: "One Gray and Company executive in a position to know said that Gray and Company was making payments to Zeller." The Power House, p. 202.

As to Statement C, defendants have demonstrated that no reasonable trier of fact could conclude that defendants acted with "actual malice" or with reckless disregard for whether the statement was false. Among other things, defendants have submitted copies of the transcript of Trento's tape-recorded interview with Barry Zorthian, former Senior Vice President in the public relations division of Gray & Company and the source of the "overbilling" statement. Defendants have also submitted statements from former Gray & Company clients regarding what they perceived as excessive bills. Finally, they have provided portions of other publications which generally speak about excessive billing practices in the public relations industry and, in at least a few instances, make specific reference to Gray & Company. Defendants have, therefore, demonstrated that, as a matter of law, no reasonable trier of fact could conclude that Statement C was published with actual malice. Accordingly, with regard to that statement, defendants are entitled to summary judgment.

As to the remaining four statements, however, the presence in the record of genuine issues of material fact precludes the court from granting defendants' motion for judgment as a matter of law. As to each such statement, a jury must resolve the conflicts and determine whether defendants acted with actual malice in publishing it.

Conclusion

For the foregoing reasons, the court holds that plaintiff is, as a matter of law, a limited public figure for the purposes of the statements at issue in this suit. To the extent that defendants' motion for summary judgment (document no. 173) seeks a legal determination as to that issue, the motion is granted. With regard to defendants' remaining motion for summary judgment (document no. 175), it is granted in part and denied in part. As to Statement C, defendants have demonstrated that they are entitled to judgment as a matter of law. With regard to all remaining statements, however, defendants' motion for summary judgment is denied.

SO ORDERED.

/s/_____
Steven J. McAuliffe
United States District Judge

May 19, 1999

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APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

[Filed March 5, 1998]

No. 95-285-M

Robert K. Gray, *Plaintiff*	)
v.	)
St. Martin's Press, Inc. and Susan Trento, *Defendants*.	)

ORDER

Plaintiff, Robert Gray, brings this action against St. Martin's Press and Susan Trento, seeking damages for allegedly defamatory statements contained in The Power House, Robert Keith Gray and the Selling of Access and Influence in Washington ("The Power House"), a book authored by Trento and published by St. Martin's. The court has jurisdiction over Gray's claims pursuant to 28 U.S.C. § 1332.

St. Martin's has moved for summary judgment, asserting that there are no genuine issues of material fact and

it is entitled to judgment as a matter of law. Specifically, it claims that: (1) Gray is a public figure and cannot prove by clear and convincing evidence that St. Martin's published the allegedly defamatory statements with knowledge of their falsity or serious doubts as to their truth; and (2) seven of the eight allegedly defamatory statements are protected opinions. Gray objects.

I. FACTUAL BACKGROUND

Early in his career, Gray worked in President Eisenhower's administration, acting as Secretary of the Cabinet, Appointments Secretary to the President, and finally as Special Assistant to the President. In 1962, he authored a book about his experiences in the White House, entitled Eighteen Acres Under Glass. Subsequently, Gray was employed as director of the Washington, D.C. office of Hill and Knowlton, Inc., a public relations and lobbying firm. In 1981, he founded Gray and Company Public Communications, International ("G&C"). In 1986, Gray sold his company to Hill and Knowlton and, until 1993, acted as Hill and Knowlton's chairman and chief executive officer.

In support of its claim that Gray is a "public figure," St. Martin's submitted copies of several articles published about Gray and his career in Washington, particularly as a lobbyist. Included are articles from U.S. News & World Report, Time, The New York Times, Forbes, and The Washington Post. St. Martin's has also submitted a list of over 400 newspaper and magazine articles which purportedly concern or relate to Gray and his activities as a Washington lobbyist. Gray himself concedes that he has "a national

reputation in the area of public relations." Gray Affidavit at para. 3.

In January of 1990, Gray read a portion of Trento's book proposal.[1] The proposal apparently opened with the assertion that, "The story of Robert Keith Gray is a metaphor for the corruption of power in Washington." Memorandum in opposition to summary judgment, at p. 15. Gray notified both Trento and St. Martin's that, in his opinion, the proposal contained numerous inaccuracies which defamed both him and others, including Sarah Brady, William Casey, and J. Edgar Hoover. Approximately six months later, Gray provided a detailed specification of each statement which he viewed as

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[1] Statements in Trento's book proposal are not directly at issue in this litigation. Nevertheless, Gray suggests that they illustrate Trento's generally sloppy research as well as her tendency to disregard the truth when necessary to generate a sensational story. Gray argues that because he specifically notified St. Martin's that the book proposal contained numerous false statements and fabrications, it should have recognized that the final version of The Power House likely contained such elements. He claims that despite such knowledge, St. Martin's failed to take reasonable steps to verify the accuracy of Trento's claims. Gray also claims that Trento's husband, Joseph Trento, contributed substantially to The Power House. Gray says that because Mr. Trento was a "highly questionable" author, whose reporting had been repeatedly questioned in the media as being less-than accurate, St. Martin's should have undertaken even greater efforts to confirm the veracity of the statements made in The Power House.

false and/or defamatory. Gray claims to have provided Trento with several sources which contradicted or, at a minimum, called into question the veracity of many of the statements set forth in Trento's book proposal. Memorandum in opposition to summary judgment, at p. 17. St. Martin's, on the other hand, says that "[n]either Mr. Baine [Gray's legal counsel] nor Mr. Gray ever provided any evidence or documentation that the contents of the proposal were in any respect inaccurate." Memorandum in support of summary judgment, at p. 11.

In July of 1992, St. Martin's published The Power House. Gray claims that eight statements contained in the book defame him. Those statements, the subject of this litigation, are as follows:

a. "As others were cleaning out their desks looking for jobs, briefing their successors, and preparing to leave the White House, Gray was busy dictating his memoirs to his White House Secretary." The Power House, p. 53.

b. "A senior Gray and Company executive insisted that Gray's closeness to the President [Ronald Reagan] and others was often faked. 'He completely faked his closeness with a number of senior administration officials.'" The Power House, p. 156.

c. "'I [a Gray and Company Senior Vice President] think there's a degree of

venality on the part of Bob and a lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of overcharging.'" The Power House, p. 165.

d. "' . . . at Gray and Company he [Gray] stage-managed impressive-sounding calls. A reporter would walk in and he would instruct his executive assistant to come in and announce that there was a call from the White House. Totally fabricated. Absolutely. They would come in and they would say, "Mr. Gray, Mr. Meese is on the phone," and he would pick up a dead line or a line that was set up by the executive assistant, carry on a conversation of four or five short rapid sentences as though he was in constant communication and hang up. And then, of course, the reporters, dazzled, would then report that a White House phone call came in,' explained one Gray and Company executive." The Power House, p. 167-68.

e. "And the Gray and Company employees in Spain were to be convinced that the office was being used as a money laundering operation

for the Reagan administration's private intelligence network." The Power House, p. 273.

f. "In the end, several Washington lobbyists feel that Gray and Company ultimately failed because it offered very little real substance." The Power House, p. 32.

g. "One Gray and Company executive in a position to know said that Gray and Company was making payments to Zeller." The Power House, p. 202.

h. "Robert Crowley believed that 'Casey may have asked Gray to take on these controversial clients – for the very purpose of spying on them.' If that were so it would explain why Gray considered countries like Libya, and took clients like Angola." The Power House, p. 260.

Complaint, paras. 11(a)-(h) .

Standard of Review

Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. 56(c). In ruling upon a party's motion for

summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party carries its burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial, demonstrating "some factual disagreement sufficient to deflect brevis disposition." Mesnick v. General Electric Co., 950 F.2d 816, 822 (1st Cir. 1991). See also Fed. R. Civ. P. 56(e). That burden is discharged only if the cited disagreement relates to a genuine issue of material fact. Wynne v. Tufts University School of Medicine, 976 F.2d 791, 794 (1st Cir. 1992). "Generally speaking, a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." Intern'l Assoc'n of Machinists and Aerospace Workers v. Winship Green Nursing Center, 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted).

Here, provided the court concludes that Gray is a limited public figure, the inquiry into "whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the clear and convincing] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255. In other words, the question presented at this stage of the litigation is "whether the evidence in the record could support a reasonable jury

finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Id., at 255-56.

Discussion

St. Martin's moves for summary judgment on two grounds. First, it claims that Gray is a limited public figure and, therefore, in order to prevail, must demonstrate that St. Martin's acted with actual malice in publishing the allegedly defamatory remarks. St. Martin's claims, as a matter of law, that Gray cannot carry that burden. Accordingly, it says it is entitled to judgment as a matter of law. Alternatively, St. Martin's moves for partial summary judgment, claiming that seven of the eight statements at issue in this case are non-actionable opinions, which are incapable of being verified as either true or false.

I. Defamation and the Limited Purpose Public Figure.

To prevail at trial on his defamation claim, Gray must establish that defendants failed to exercise reasonable care in publishing, without a valid privilege, false and defamatory statements of fact about him. See Indep. Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, 138 N.H. 110, 118 (1993); Nash v. Keene Publishing Corp., 127 N.H. 214, 219 (1985). To the extent he is a public figure, Gray's burden is augmented because, under the First Amendment, defamatory statements concerning a "public figure" are only actionable if they were made with "actual malice." Actual malice is either knowledge that the statements in question were false or a reckless disregard for whether they were false

or not. New York times v. Sullivan, 376 U.S. 254, 279-80 (1964).

This court (Devine, J.) recently addressed the legal concept of the "public figure" and observed:

> The designation "public figure" may rest on two alternative bases. First, in some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. Second, persons of lesser fame may nonetheless qualify as limited public figures if they "thrust themselves to the forefront of particular public controversies." Such limited public figures are subject to the "actual malice" standard only for defamation arising out of the public controversy into which they have thrust themselves.

Faigin v. Kelly, 978 F.Supp. 420, 426 (D.N.H. 1997) (citations omitted). Here, St. Martin's claims that Gray is a limited public figure insofar as: (1) there is a "public controversy" concerning Washington lobbyists; and (2) Gray purposefully thrust himself into that public controversy.

Whether an individual is a limited public figure presents a question of law.[2] Resolution of that issue,

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[2] Under New Hampshire's law of defamation, "the determination of public official or public figure status is a jury question." Nash v. Keene Publishing Corp., 127 N.H. 214, 222 (1985). However, because Gray elected to bring his claims in

however, requires "a detailed fact-sensitive determination." Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 561 (1st Cir.), cert. denied, 118 S.Ct. 297 (1997). First, the court must determine whether a "public controversy" actually existed. Then it must consider whether "the nature and extent of the person's participation in the controversy reached some critical mass at which 'voluntary injection' occurred." Id., at 561-62 (quoting Lawrence H. Tribe, American Constitutional Law § 12-13, at 880-81 (2d ed. 1988)).

Nevertheless, even assuming that Gray is a limited public figure and must prove, by clear and convincing evidence, that St. Martin's acted with actual malice, genuine issues of material fact preclude the entry of summary judgment in favor of St. Martin's. As the court of appeals for this circuit has noted:

> The subjective determination of whether [a defamation defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. A court typically will infer actual malice from

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federal court, federal law, rather than state law, governs resolution of this issue. And, "[u]nder federal law, the public official and public figure questions are ones for the court." Kassell v. Gannett Co., 15 Med. L. Rep. 1205, 1206 (1st Cir. 1988). See also Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987) ("[I]t is federal law that must control the division of responsibility between judge and jury . . . .").

> evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences support[] the existence of actual malice.

Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 196 (1st Cir. 1982). Here, the facts of record and the reasonable inferences which can be drawn from them support Gray's claim that St. Martin's acted with actual malice. At a minimum, they are sufficient to preclude the entry of summary judgment in favor of St. Martin's.

Among other things, Gray asserts that neither Trento nor St. Martin's has provided a list of all sources for the statements at issue. Without access to those purportedly confidential sources and a detailed account of the information which they allegedly provided to Trento and/or St. Martin's, the court cannot conclude, as a matter of law, that St. Martin's acted without malice. Moreover, in light of the evidence submitted by Gray which calls into question the accuracy and thoroughness of Trento's research (e.g., the book proposal and its numerous allegedly false, fabricated, and/or defamatory statements; Gray's detailed analysis of Trento's claimed sources for the statements at issue and cogent discussion of why those sources do not support the allegedly defamatory comments in The Power House; etc.), a jury might reasonably conclude that St. Martin's had good reason to doubt the accuracy of Trento's reporting and, therefore, should have taken additional steps to corroborate her claims. See, e.g., McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510 (D.C. Cir. 1996) ("[I]f a defendant has reason to doubt the veracity of its source, then its utter failure to examine evidence within easy reach or to make

obvious contacts in an effort to confirm a story would be evidence of its reckless disregard.").

Based upon the record as it presently exists, a reasonable trier of fact could conclude that: (1) one or more of the statements at issue was false; and (2) St. Martin's acted with knowledge of the falsity, or with reckless disregard as to the truth or falsity, of such statement(s) . Consequently, on that issue at least, St. Martin's is not entitled to judgment as a matter of law.

II. Protected Expressions of Opinion.

The Supreme Court has recognized that, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Subsequently, the Court of Appeals for the First Circuit observed that:

> The doctrine of constitutionally protected opinion is an attempt to reconcile the conflict between defamation law, which has as a major purpose the compensation of individuals for speech that harms them, and the first amendment, which has among its purposes the protection of free speech.

McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987).

Nevertheless, while some constitutional protection is afforded to "opinions," that protection is not unbounded.

> [W]e do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.
>
> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"

Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990). See also Levinsky's v. Wal-Mart Stores, Inc., 127 F.3d 122, 127-28 (1st Cir. 1997) ("The First Amendment does not inoculate all opinions against the ravages of defamation suits. A statement couched as an opinion that presents or implies the

127-28 (1st Cir. 1997) ("The First Amendment does not inoculate all opinions against the ravages of defamation suits. A statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable.").

Numerous courts have wrestled with this "fact-opinion" dichotomy. In an effort to assist trial courts in their efforts to resolve that issue, Chief Judge Posner of the Court of Appeals for the Seventh Circuit has opined that:

> A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). Nevertheless, the question over how best to separate actionable statements from mere opinions has been, and likely will continue to be, a topic of debate. Compare Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983) ("three factors [are] important in determining whether a statement is [one of] fact or opinion") with Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (utilizing four factors in the same analysis).

This circuit appears to have adopted the multi-factor analysis articulated by Court of Appeals for the District of Columbia in Ollman. See Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992); McCabe v.

distinction between statements that are actionable and those that are not." Levinsky's, 127 F.3d at 127.

Against that backdrop, St. Martin's claims that statements (b), (c), (e), (f), and (h) are not actionable because they are not the type of factual statements that can be proved false. Defendant's memorandum at p. 45. With regard to statements (b), (f), and (h), St. Martin's is correct; as a matter of law, those statements are not actionable. Among other things, they contain language that makes it clear that they are speculative expressions of opinion (e.g., "Crowley believed" and "if that were so"). Moreover, statement (f) contains language ("offered very little real substance") which, by its vague and ambiguous nature, does not lend itself to proof as being either true or false. See generally Milkovich v. Lorain Journal Co., 497 U.S. at 17 (recognizing that "rhetorical hyperbole" and "imaginative expression" are not normally actionable); Levinsky's, 127 F.3d at 129 ("a particular word or phrase ordinarily cannot be defamatory unless in a given context it reasonably can be understood as having an easily ascertainable and objectively verifiable meaning. The vaguer a term, or the more meanings it reasonably can convey, the less likely it is to be actionable."). The same is true with regard to statement (b) (Gray "faked his closeness" with President Reagan). See, e.g., Phantom Touring, 953 F.2d at 728 (holding that the words "fake" and "phony" are unprovable adjectives, which lend themselves to numerous interpretations).

In the end, no reasonable trier of fact could conclude that any of those statements implies a defamatory statement of fact. Accordingly, St. Martin's is entitled to summary judgment with regard to statements (b), (f), and (h). The

remaining statements could reasonably be interpreted to imply false assertions of fact (e.g., that Gray overcharged clients, that the Spain office of G&C was a money laundering operation, etc.). Consequently, St. Martin's is not entitled to judgment as a matter of law with regard to Gray's claims as to those statements.

III. Statements "of or Concerning" Gray.

Finally, St. Martin's claims that statements (e), (f), and (g) refer only to the corporate entity G&C and not to Gray personally. Accordingly, it says that Gray cannot recover for those allegedly defamatory statements. Having previously ruled that statement (f) is not actionable, the court will address only statements (e) and (g) .

St. Martin's correctly points out that, to be actionable, the alleged defamatory statements must be "of or concerning" Gray. See, e.g., Indep. Mechanical Contractors, 138 N.H. at 118; Keene Publishing Corp., 127 N.H. at 219. However, it erroneously concludes that statements about G&C cannot, as a matter of law, defame Gray. Even though statements (e) and (g) do not specifically refer to Gray, he may prevail if a reader of The Power House would, based upon his or her understanding of Gray's role in G&C, reasonably believe that those statements refer to him. See Restatement (Second) of Torts, § 564A. See also Caudle v. Thomason, 942 F.Supp. 635, 638 (D.D.C. 1996); Winn v. United Press International, 938 F.Supp. 39, 43-44 (D.D.C. 1996).

During the periods referenced in comments (e) and (g), Gray was the chairman of G&C. Based upon Gray's substantial role in the corporation, the court cannot conclude,

as a matter of law, that a reasonable reader of The Power House would not infer that Gray was responsible for or involved in the conduct referenced in those comments.

Conclusion

For the foregoing reasons, St. Martin's motion for summary judgment (document no. 93) is granted in part and denied in part. St. Martin's is entitled to judgment as a matter of law with regard to Gray's claims as to statements (b), (f), and (h), as alleged in paragraph 11 of plaintiff's complaint. In all other respects, St. Martin's motion is denied.

SO ORDERED.

/s/_____
Steven J. McAuliffe
United States District Judge

March 5, 1998

cc: James G. Walker, Esq.
Mark D. Balzli, Esq.
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Supreme Court, U.S.
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(2)

No. 00-700

IN THE
Supreme Court of the United States

ROBERT K. GRAY,

Petitioner,

v.

ST. MARTIN'S PRESS, INCORPORATED
and SUSAN TRENTO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent St. Martin's Press, Incorporated, is St. Martin's Enterprises, Inc., and no publicly held company owns 10% or more of the stock of St. Martin's Press, Incorporated.

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INTRODUCTION

The First Circuit's unanimous decision affirming the dismissal of Petitioner's libel claims constitutes a straightforward application of settled First Amendment principles that, over the past three decades, have been repeatedly reaffirmed by this Court. Beyond question, the First Circuit properly held that, under established Supreme Court precedent, a public figure libel plaintiff must show "actual malice" to prevail and that, additionally, a statement must contain or imply a provably false factual assertion to be actionable. Nothing in the Petition indicates a basis for review of the lower courts' application of these firmly established First Amendment standards.

The first question presented — in which Gray now argues that the actual malice standard should be abandoned in limited purpose public figure libel cases in favor of a "professional negligence" test — was never raised by Gray in the proceedings below or considered by the lower courts. The question is therefore not appropriate for Supreme Court consideration under this Court's prudential rules of practice. Similarly, because the First Circuit determined that there was a public controversy regarding Washington lobbyists "continuing up to the book's publication" in 1992 and that "Gray was a central figure in this controversy," it did not reach (or express any view on) Gray's legal argument that public figure status should lapse where — unlike here — a plaintiff is no longer in the public eye at the time of the disputed publication. Since the First Circuit's unchallenged factual determination obviated any need to reach Gray's "passage of time" argument, Gray's second question presented is also not properly before the Court on this record. Lastly, the third question presented is merely a demonstrably incorrect assertion by Gray that the First Circuit failed to consider tenor and context in determining that Statement (b) does not state or imply a provably false fact.

This case presents no conflict in the circuits, nor any departure from judicial precedent, nor any other compelling reason to grant the Petition under Supreme Court Rule 10. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This libel action arises from a book, entitled *The Power House* (the "Book"), that was written by Respondent Susan Trento and published by Respondent St. Martin's Press, Incorporated ("St. Martin's") in July 1992. A 873.[1] The Book describes the operation of well-connected Washington lobbyists and their influence on our government, focusing on the professional activities of Gray as the then most prominent lobbyist in the nation. Trento spent more than two years researching the Book and conducted interviews with more than 100 people, including "lobbyists and public relations professionals, government officials, legislators, clients of Gray's, friends and competitors." Book at xi; A 870-871.

A. Petitioner Robert Gray

As found by the District Court, "Robert K. Gray has lived in the public's eye for over three decades."[2] He has been described in news articles as "one of the nation's most

1. In this Brief, "A" refers to the Appendix submitted by the parties to the First Circuit. The District Court's opinion of March 5, 1998 is referred to herein as "1998 D. Ct. Op." and the District Court's opinion of May 19, 1999 is referred to as "1999 D. Ct. Op.," followed by page cites to the Appendix accompanying the Petition, where the opinions are reproduced. The Court of Appeals' opinion of August 2, 2000 is referred to as "Ct. App. Op.," followed by page cites to the Appendix to the Petition. "Pet" refers to the Petition for Writ of Certiorari.

2. *See* District Court order of September 30, 1997 at 2, which is reproduced in the Addendum to Plaintiff-Appellant's Brief in the Court of Appeals.

powerful lobbyists," a "lobbying and public-relations legend," a "professional self-promoter" and a "limelight-aholic" who has publicly credited himself with "bringing lobbying out of the closet." A 308, 319, 348, 417, 424.

From 1961 to 1981, Gray was the director of the Washington, D.C. office of Hill & Knowlton, one of the world's largest public relations and lobbying firms. He then founded, and from 1981 to 1986 was the Chairman of, Gray and Company Public Communications, International, which was one of Washington's most prominent and visible lobbying firms. A 38, 319. Gray subsequently served as Chairman and Chief Executive Officer of Hill & Knowlton from 1986, when he sold his company to Hill & Knowlton, until 1993. A 38.

In tandem with his government lobbying activities, Gray was for many years active in Republican party politics. In 1980, he served as Director of Communications for the Reagan-Bush campaign and, in 1981, as Co-Chairman of the Reagan Inauguration. A 319-21. He also professed in a 1996 *Miami Herald* op-ed piece to having served the White House during the Reagan years as a "spin-doctor." A 500.[3]

Gray has repeatedly entered the public arena to promote his brand of lobbying and himself. *E.g.*, A 307-308, *Forbes*, "*The Gray Eminence*"; A 490-92, *Time*, "*How Top Lobbyist Bob Gray Makes Friends and Sells Influence*"; A 309-311, *The Washington Post*, "*Robert Gray's Lobbyists: Turning Washington's Wheels.*" By the time the Book was published in 1992, he had been discussed, photographed and featured

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3. Even before beginning his career as a lobbyist, Gray held positions in the White House for six years, first as Special Assistant to President Eisenhower, then as Appointments Secretary to the President, and finally as Secretary of the Cabinet. A 38. Gray sought attention for his White House experiences by authoring a book entitled *Eighteen Acres Under Glass*. A 425.

in more than 460 magazine and newspaper articles, including numerous cover stories and lead articles, and had participated in interviews about virtually every aspect of his lobbying activities and business. A 302-514. He had appeared on national television programs, such as *The Today Show* and other news programs, and was the subject of a CNN documentary. A 331, 499. He authored a 1986 *New York Times* op-ed piece entitled *In Defense of Lobbyists*, and from 1986 through 1992 alone was featured or mentioned in at least 188 news stories. A 493, 360-375. *E.g.*, A 434, *The Washington Post*, "*Image Conscious*," Oct. 5, 1992 (Gray is "well-known for courting the media and using it in unabashed promotion").

For years, Gray and his high-profile style of lobbying were at the epicenter of national debate over the influence and activities of lobbyists.[4] Among other topics of concern, in the 1980s and 1990s there was sustained public criticism over the billing practices of Gray, his companies and other lobbyists and over whether their clients really got the government access they so handsomely paid for. *E.g.*, A 453, *Newsweek*, "*The Real Price of Buying Influence*," Jan. 13, 1992 ("[b]eware . . . Washington lobbyists . . . regularly milk clients. . . . [S]everal former employees of Hill & Knowlton and Gray and Co. . . say that there has been intense pressure over the years to rack up billable hours"); A 476, *The New Republic* ("Robert K. Gray . . . hype[s] [his] connections and sells them for exorbitant fees to any cause, foreign or domestic");

4. *E.g.*, A 331, *The National Journal* ("without a doubt Gray and Co. is Washington's most controversial public relations firm"); A 359, *Time* (criticizing Gray for "overselling businessmen on his ability to solve all their Washington problems with a few phone calls"); A 307-308, *Forbes*, "*The Gray Eminence*" (Gray is a "limelight-aholic, a lot like a political person," who has "built a successful business . . . [on] access and influence"); A 454, *Newsweek* ("Gray rose to the top of his profession in part because clients heard he was friends with the Reagans").

A 323, *Time*; A 315, *The Washington Post*. Consistent with his credo of "bringing lobbying out of the closet" (A 319), Gray served as an outspoken defender of the lobbying industry in this public controversy over its billing and business practices.[5]

B. Procedural History of this Lawsuit

On June 2, 1995, almost three years after the Book's publication, Gray sued Trento and St. Martin's in the District of New Hampshire for libel based on eight passages in the 430-page Book. A 37-43. In June 1997, after two years of discovery, St. Martin's moved for summary judgment on various grounds as to each of the eight passages in suit. A 15.[6]

On March 5, 1998, the District Court denied summary judgment as to five of the passages, but dismissed Statement (b) and two other passages on the ground that they were not capable of being proven true or false. 1998 D. Ct. Op. at 46a. The parties thereafter completed discovery and, in February 1999, defendants filed an additional summary judgment motion seeking a determination that Gray was a public figure and the dismissal of the remaining five passages in suit on the ground that they were not published with "actual malice." A 28.

In its second summary judgment decision, dated May 19, 1999, the District Court ruled that Gray was a

5. *E.g.*, A 454, *Newsweek*, Jan. 13, 1992 ("I'd have the best employee's head if I found him dumping hours on a client with no work"); A 491, *Time* ("today's lobbyist has to be a straight shooter"); A 402-403, *Washington Business Journal* ("I think lobbyists are as honest as any group I know"); A 493, Robert K. Gray, *The New York Times*, "*In Defense of Lobbyists.*"

6. The eight passages, which have been designated in this proceeding as Statements (a) through (h), are set forth in the Addendum to the Court of Appeals decision. Pet. at 17a-19a. Only Statements (b) and (c) are relevant to Gray's Petition for Writ of Certiorari. Pet. at 2, 4 n.3.

"limited purpose public figure" as to his lobbying activities and, as such, was required to prove actual malice. 1999 Dist. Ct. Op. at 26a-27a. The District Court then denied summary judgment as to four of the remaining passages, but dismissed Statement (c), which was a quote from a former Gray and Company executive that there was "an awful lot, to me, of overcharging" at Gray and Company. Pet. at 28a. As to this statement, the District Court concluded that no reasonable trier of fact could find by clear and convincing evidence that Statement (c) was published by either Trento or St. Martin's with actual knowledge of its falsity or reckless disregard for whether it was false. 1999 Dist. Ct. Op. at 29a.[7]

In reaching this conclusion, the District Court noted that Statement (c) was a verbatim, tape-recorded quote from Barry Zorthian, who had been a Senior Vice-President at Gray and Company and who had also held other important positions of responsibility, including President and Chairman of Time Life Broadcast. 1999 Dist. Ct. Op. at 29a; A 874-75, 902, 1199-1201. As the District Court found, however, Trento did not rely on Zorthian alone. 1999 Dist. Ct. Op. at 29a. She also obtained independent corroboration of Zorthian's "overcharging" statement from her interviews with two other senior executives of Gray and Company[8],

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7. Statement (c) reads in full:

> I think there's a degree of venality on the part of [Gray] and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of overcharging. Pet at 18a.

8. A 909-911, *Tape Recorded Interview of Carter Clews, former Senior Vice President of Gray and Company* ("Anytime a client had money, you'd see hours pop up from no where. . . . I remember Frank [Mankiewicz, the head of Gray and Company's Public Relations (Cont'd)

from a book written by a former Gray and Company executive [9] and from news articles about Gray and Company's billing practices that were published by credible national news organizations such as *Newsweek*, *Time* and *The Washington Post*.[10] 1999 Dist. Ct. Op. at 29a; A 876-877. In addition to these multiple sources, Trento also repeatedly sought to interview Gray, but he declined all her requests (although he did provide, through his attorney, written answers to some of Trento's questions). A 690-71, 1154-55. In his Petition, Gray fails to apprise the Court of any of these facts.[11]

(Cont'd)
Division] pointed out that no phone call takes less than one hour, always keep that in mind, he said. Once you pick up the phone, that's one hour, it doesn't matter how long you talk. That is the kind of thing they'd do. . . . [Gray] bought wine at Christmas for all the clients and then billed them for it plus a mark up."). *See also* A 913, *Tape Recorded Interview of Alejandro Orfila, former President of the Organization of American States and former President of the International Division of Gray and Company.*

9. A 876-77, Joan Braden, *Just Enough Rope* (1989) ("The Canadian account was a bottom line account. Everybody who could fancy the slightest reason for piling on, piled on. . . . Why were six people from the press department [of Gray and Company] attending a conference in Ottawa? Why not two people or one person?").

10. A 914, *Newsweek*, "*The Real Price of Buying Influence*," Jan. 13, 1992 ("A former Gray & Co. consultant recalls a colleague including on his 'billable hours' time sheet for one account the hours he spent — more than $1,000 worth — looking for a gift for a client"); A 916, *Time*, "*Pitchman of the Powerhouse*," April 30, 1984 ("Says a former [Gray and Company] employee: 'Suddenly at the end of the month, the client is hit with a $40,000 to $50,000 bill. He says, 'My God, what have I gotten for this?'"); A 920, *The Washington Post*, "*Inside the Power House*," June 28, 1984.

11. In addition, pursuant to Supreme Court Rule 15(2), Respondents point out that pages 7 through 9 of the Petition are riddled with misstatements and rhetorical assertions that have no support in the record. To take but a few examples, Gray asserts that Zorthian had "no involvement or direct knowledge about the billing

(Cont'd)

A two-week jury trial was thereafter held on the four passages that the District Court found presented issues of fact, including a statement by a former Gray and Company

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(Cont'd)
practices of Gray & Company." Pet. at 7. The record shows, however, that as a senior officer of the company, Zorthian was plainly in a position to know about its billing practices and, in fact, provided Trento with specific examples of excessive billing by Gray and Company. A 875, 900-901, 903. Moreover, the record contains no evidence that — as Petitioner claims — Trento "purposely avoided" speaking to sources "whom she believed would offer evidence contrary to . . . Zorthian." Pet. at 11. Similarly, Petitioner's assertion that Trento "acknowledged her preference to seek out disgruntled witnesses to help her make her case against the plaintiff" (Pet. at 8) is not an accurate statement of the record. Additionally, John Lawler — the "person" referred to in the second bullet point on page 8 of the Petition — merely stated that he had "never heard" about overcharging. A 193. He did not in any manner contradict the specific instances of overcharging provided by Trento's multiple sources; he did not make any "exculpatory statement" about overcharging; and it was Lawler himself who Trento found to be a "waste of time" because of his "gladhanding superficial[ity]" and evasiveness. *Compare* A 223 with Pet. at 8. Lastly, there is no evidence in the record to support Gray's misstatement that Trento "*knew*" James Jennings and Charles Crawford "to be key witnesses . . . about Gray and Company's billing practices." Pet. at 8 (emphasis added).

As to St. Martin's, there is no evidence that supports Gray's misstatements that St. Martin's "knew from the outset that [Zorthian] . . . could not be trusted" or that "no effort [was made] to verify Zorthian's [overcharging] statement." Pet. at 8, 9. As set forth in the affidavit of the outside counsel (Paul Sleven) who conducted a lengthy pre-publication legal review of the Book on St. Martin's behalf, "I found that the Gray and Company Senior Vice President's opinion that Mr. Gray overcharged was corroborated by a great deal of highly credible evidence from other sources," including "several officers of Gray & Co. who were in a position to be familiar with Gray & Co.'s billing practices." A 524, 526-28, 1157. Similarly, the record is barren of any evidence that St. Martin's editorial staff "expressed concerns about . . . inaccuracies" in the Book or believed that Trento's two years of research was "sketchy." Pet. at 9.

executive (Statement (d)) that Gray had "[t]otally fabricated" and "stage-managed impressive sounding calls" from White House officials. 1999 Dist. Ct. Op. at 30a. On June 22, 1999, the jury returned special verdicts in favor of Trento and St. Martin's finding that, as to each of the four passages, Gray had failed to prove that Repondents had published to third parties statements about Gray that were false and defamatory. A 672, 674-76, 1291.[12]

C. The First Circuit Decision

In an opinion issued on August 2, 2000, the United States Court of Appeals for the First Circuit affirmed the District Court's grants of summary judgment in all respects. *Gray v. St. Martin's Press*, 221 F.3d 243 (lst Cir. 2000).

Applying de novo review, the First Circuit agreed with the District Court that Gray was a limited purpose public figure with respect to his lobbying activities (and, hence, required to show actual malice as to Statement (c)). Ct. App. Op. at 11a-12a (citing *Gertz v. Robert Welch*, 418 U.S. 323, 351-52 (1974)). In his brief to the First Circuit, Gray alternatively argued that, even if he had been a limited purpose public figure through 1986, he was no longer "the focus of media attention" when the Book was published in 1992, relying on the fact that out of 188 articles discussing him after 1986, "*only*" 11 mentioned him in a *headline*. Plaintiff-Appellant's Brief at 27-29 (emphasis added). The First Circuit rejected this factual contention, finding that "the record shows numerous articles concerning Gray, his company and Hill and Knowlton published between 1986

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12. While the jury's finding of no liability on the common law elements of Gray's libel claims made it unnecessary to proceed any further, the jury also found that Gray had failed to prove actual malice by clear and convincing evidence as to either Trento or St. Martin's. A 673, 674-76.

and 1992." Ct. App. Op. at 12a, n.3. Having found that Gray remained a limited purpose public figure "up to the book's publication" (*id.* at 11a), the First Circuit did not address or express any view on Gray's legal argument that public figure status should lapse where — unlike here — the plaintiff is no longer in the public eye at the time of the disputed publication.

The First Circuit also agreed with the District Court's assessment that no reasonable jury could find that either Trento or St. Martin's had published Statement (c) with actual knowledge of falsity or "a high degree of awareness of . . . probable falsity." Ct. App. Op. at 13a (quoting *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989) (internal quotation omitted)). As to Trento, the court found that Zorthian's alleged hostility against Gray did "not preclude reliance" on Zorthian as a source, particularly since several other sources connected with Gray and Company had corroborated Zorthian's claim of overcharging. Ct. App. Op. at 13a-14a. The court also held that Gray's allegation that Trento *should have* interviewed two additional employees who would have denied such overcharging was not evidence of recklessness since "Trento already had multiple sources and was under no obligation to exhaust every possible witness before winding up her investigation." *Id.* at 14a.[13]

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13. Likewise finding no actual malice by St. Martin's, the First Circuit rejected Gray's argument that St. Martin's should have doubted Trento's accuracy because, two years before the Book's publication, Gray's attorney had sent correspondence to St. Martin's objecting to Trento's initial written *"proposal"* for a book about Gray. Ct. App. Op. at 14a. The court noted that, not only was there no claim in this correspondence that the subject matter of Statement (c) was false, "[b]ut the proposal was followed by more than two years of research and there is no evidence that St. Martin's employees doubted the accuracy of Trento's final product." *Id.*

Finally, Statement (b) — in which a Gray and Company executive expressed his view that Gray "faked his closeness" with President Reagan and other senior administration officials — was held by the First Circuit to constitute a non-actionable statement of opinion because it did not "present or imply the existence of facts that can be proven true or false." Ct. App. Op. at 4a-5a (citing *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1, 18-20 (1990)). In so holding, the court stated that whether calling something a "fake" asserts an objective fact "depends very much on what is meant and therefore on context." Ct. App. Op. at 6a. Here, the First Circuit found that the "book made quite clear" that Gray did, in fact, have personal and professional relationships with President Reagan and other senior administration officials. *Id.* at 6a; Book at 154 ("Gray was friends with Ronald Reagan, Ed Meese, Cap Weinberger, Richard Schweiker, Charles Wick and others in the administration"); *see also* Book at 30, 68, 89, 134-35, 155, 168, 177, 340-46. The First Circuit therefore held that, in context, Statement (b) was merely the speaker's subjective view that Gray tended to exaggerate the degree of his "closeness" with President Reagan and others, a "subjective judgment" that was too "vague" to be capable of verification. Ct. App. Op. at 6a-7a.

REASONS FOR DENYING THE WRIT

I. PETITIONER OFFERS NO MERITORIOUS REASON FOR OVERTURNING DECADES OF PRECEDENT PROTECTING THE PUBLICATION OF STATEMENTS MADE WITHOUT ACTUAL MALICE IN PUBLIC FIGURE LIBEL CASES

More than 30 years of Supreme Court and circuit court precedent have firmly established the constitutional principle that a public figure libel plaintiff must show actual malice to prevail on his claims. Petitioner asks this Court

to reverse the outcome of this libel action by simply overruling *New York Times v. Sullivan* and its progeny in *all* limited purpose public figure cases. Pet. at 5. The Court should decline Petitioner's invitation to dislodge decades of First Amendment jurisprudence.

A. Petitioner's First Question Is Not Appropriately Before This Court Since It Was Neither Raised Below Nor Considered By The Lower Courts

As a threshold matter, Petitioner's argument that the actual malice standard should be replaced with a "professional negligence" test is not an appropriate question to be reviewed in this case. This argument was never presented by Petitioner in the proceedings below or passed on by the lower courts. In fact, contrary to his current argument, Petitioner expressly acknowledged in his First Circuit brief that "[t]o recover in a defamation action, a limited purpose public figure must prove by clear and convincing evidence that the defendant published the defamatory statement with actual malice. . . ." Plaintiff-Appellant's Brief at 30.

This Court has frequently held that, "[a]bsent exceptional circumstances," it will not consider questions that were not raised or ruled upon in the lower federal court proceedings. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).[14] This prudential restriction on the Court's certiorari jurisdiction furthers several important policies, including the Court's "own need for a properly developed record on appeal." *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *Accord Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) ("questions not raised

14. *E.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992); *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988); *McGoldrick v. Campagnie Generale*, 309 U.S. 430, 434 (1940) ("it is . . . the settled practice of this Court . . . that it is only in exceptional cases . . . that it considers questions argued by a petitioner or appellant not pressed or passed upon in the lower courts").

below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind"). Moreover, the Court "adhere[s] scrupulously" to its customary rule against considering questions not raised or ruled on below particularly where, as in this case, the Petitioner is requesting the Court to modify "an existing constitutional right" or decide a question of "great public importance." *Illinois v. Gates*, 462 U.S. 213, 221, 224 (1983) (declining to consider whether the federal exclusionary rule should be modified where the question was "not pressed or passed upon" in the courts below); *see also Mishkin v. New York*, 383 U.S. 502, 512-13 (1966). The Court's policy of refusing to consider arguments for modification or abolition of constitutional precedents that were not pressed or passed on below "promote[s] respect for the procedures by which [the Court's] decisions are rendered, as well as confidence in the stability of prior decisions." *Gates*, 462 U.S. at 224.

In his Petition, Gray seeks to overturn what, by any measure, constitutes a bedrock constitutional principle. His failure to have raised such an important question below and the lack of any lower court decision on the issue alone dictate that certiorari be denied.

B. This Court has Repeatedly Reaffirmed That The Actual Malice Standard Strikes The Correct Balance Between Freedom of Speech and Reputational Interests In Public Figure Cases

Petitioner asks this Court to discard decades of carefully crafted constitutional jurisprudence on the ground that the "actual malice standard has evolved into a barrier nearly impossible to overcome" and "encourages sloppy journalism." Pet. at 5, 10. Not only are these assertions without foundation, but this very case illustrates the significant First Amendment principles that have animated

this Court's adoption, and repeated reaffirmance, of the actual malice standard in public figure libel cases.[15]

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court fashioned a constitutional rule intended to free criticism of public officials from the restraints imposed by the common law of defamation. Recognizing that "erroneous statement is inevitable in free debate," the Court adopted the actual malice standard to provide "breathing space" for freedom of expression and to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." 376 U.S. at 272, 270.

Three years later, in *Curtis Publishing Co. v Butts*, 388 U.S. 130 (1967), a majority of the Court determined:

> that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

Gertz, 418 U.S. at 336-37 (quoting *Butts*, 388 U.S. at 164 (Warren, C.J., concurring in result)). As explained by Chief Justice Warren in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " *Butts*, 388 U.S. at 164.

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15. Petitioner's first question does not challenge the correctness of the lower courts' application of the actual malice standard to the facts of this case (perhaps in recognition that, under Supreme Court Rule 10, certiorari is "rarely granted" to review an asserted "misapplication of a properly stated rule of law").

In the more than 30 years since *Butts* was decided, this Court has consistently reaffirmed that the actual malice standard "defines the level of constitutional protection appropriate to the context of defamation of a public person." *Gertz*, 418 U.S. at 342.[16] As Chief Justice Warren presciently observed in words that could describe Petitioner and his lobbying activities, as decision making in our society becomes more and more diffuse, with a "blending of positions and power" between the public and private

16. *E.g.*, *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) ("[t]he First Amendment limits [state] libel law in various respects. When, as here, the plaintiff is a public figure he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice . . ."); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("*The New York Times-Butts-Gertz* culpability requirements . . . ensure that debate on public issues remains 'uninhibited, robust and wide-open'"); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666 (1989) ("[t]oday, there is no question that public figure libel cases are controlled by the New York Times standard"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not'"); *Anderson v. Liberty Lobby*, 477 U.S. 242, 244 (1986) ("[t]hese New York Times requirements [of showing actual malice by convincing clarity] we have since extended to libel suits brought by public figures as well"); *Philadelphia Newspaper v. Hepps*, 475 U.S. 767, 773 (1986) ("[t]he standards of New York Times apply not only when a public official sues a newspaper, but also when a 'public figure' sues a magazine or news service"); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 163-64 (1979) ("the Court [has] extended the New York Times standard to 'public figures'"); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-134 (1979); *Herbert v. Lando*, 441 U.S. 153, 159 (1979) (the actual malice standard "has been repeatedly reaffirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures"); *Time v. Firestone*, 424 U.S. 448, 453 (1976).

sectors, non-governmental public figures "often play an influential role in ordering society." *Butts*, 388 U.S. at 163-164. So too, like public officials, public figures — and especially Petitioner —typically enjoy easy access to the media to respond to criticism and, "more importantly," have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" by "invit[ing] attention and comment." *Wolston*, 443 U.S. at 164 (quoting *Gertz*, 418 U.S. at 345). Application of the actual malice standard to criticism of public figures therefore safeguards the fundamental First Amendment freedom to speak out on matters of public concern involving those who, with "vigor and success . . . [,] seek the public's attention." *Gertz*, 418 U.S. at 323.

These animating principles are exemplified by this very case, where Petitioner, through his highly publicized and often controversial public relations and lobbying activities, functioned "a lot like a political person" (A 307-308) and was intimately involved in influencing domestic legislation, foreign policy and executive action — issues of paramount public concern that go to the core of our democratic process. *E.g.*, A 307-308, 309, 313-14, 319, 323, 332, 345-47, 423, 428-30, 455-57, 463-64, 500, 513-14, 572-73. As Chief Justice Warren recognized over 30 years ago in extending the actual malice standard to public figures, "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred." *Butts*, 388 U.S. at 163. And as more power and influence over events of societal concern devolve to the private sector, the need to protect discussion of non-governmental public figures has, if anything, increased.

Petitioner does not seriously challenge the rationale and underpinnings of the actual malice standard in public figure cases. Instead, he asserts two consequences that he argues merit reconsideration of the rule.

Petitioner's first assertion — that the actual malice standard encourages journalists and publishers "to avoid review or verification of the information contained in their reports" (Pet. at 11) — is little more than rhetoric and, in fact, is contradicted by the record in this case. Although Zorthian, as a senior officer of Gray and Company, was himself in a position to know about the company's billing practices (and gave Trento specific examples), Trento did not end her newsgathering there. A 874-75. She investigated further, and independently verified Zorthian's overcharging claim with highly credible evidence from many other sources, including three other Gray and Company officers and national news reports. A 874-77, 901-911, 913, 914, 916, 920. Contrary to Petitioner's claim of "purposeful avoidance" (Pet. at 11), she also repeatedly attempted to interview Petitioner — but he refused. A 869-71, 1154-55. Her manuscript and source materials were then submitted to St. Martin's legal counsel, who conducted a meticulous "sentence by sentence" pre-publication legal review of the Book — including Statement (c) — that comprised some 207 hours over 48 separate days. A 523-525, 526-528. This is hardly evidence of "sloppy journalism," and belies Petitioner's suggestion that the protection afforded by the actual malice standard has led to an erosion of the standards adhered to by professional journalists, authors and publishers.[17]

Equally exaggerated is Petitioner's assertion that "[the] actual malice standard has evolved into a barrier

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17. Much of Petitioner's rhetoric about reporters and the press appears to come from a law review article, Philip L. Judy, *The First Amendment Watchdog Has a Flea Problem*, 26 Cap. U. Law. Rev. 541 (1997). Like Petitioner's arguments here, this law review article is devoid of any evidence or data that the actual malice standard promotes "shoddy journalistic practices" or "publication of inaccurate material." Pet. at 11, 9. In fact, quite the opposite, the article notes that "[m]any editors and reporters state that . . . professional standards . . . control the editorial process." Judy at 562-563.

nearly impossible to overcome." Pet. at 5. This claim is belied by numerous cases in which appellate courts applying the actual malice standard have affirmed, in whole or in part, damage awards in defamation actions brought by public figures or public officials.[18] As this Court has previously observed, while the actual malice test provides "breathing space" for robust debate, this "does not mean that any speech about a public figure is immune from sanction in the form of damages." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *see also Harte-Hanks*, 491 U.S. at 657 (affirming finding of actual malice in public figure libel action).

Finally, Petitioner's suggestion that this Court replace the actual malice standard with a "professional negligence"

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18. *E.g.*, *Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997) (applying actual malice standard to claims for misrepresentation, invasion of privacy and misappropriation); *Crane v. Arizona Republic*, 108 F.3d 337 (9th Cir. 1996); *Rassam v. Yousef*, 92 F.3d 1181 (4th Cir. 1996); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Gertz v. Robert Welch*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Beal v. Bangor Publishing Co.*, 714 A.2d 805 (Me. 1998); *Prozeralik v. Capital Cities Communications*, 222 A.D.2d 1020 (N.Y. 4th Dep't 1995), *leave denied*, 672 N.E. 2d 605 (N.Y. Ct. App. 1996); *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995); *Hinerman v. Daily Gazette Co.*, 423 S.E. 2d 560 (W.Va. 1992), *cert. denied*, 507 U.S. 960 (1993) (affirming verdict for plaintiff under actual malice standard, while going on to hold plaintiff was not a public figure); *Henrichs v. Pivarnak*, 588 N.E. 2d 537 (Ind. Ct. App. 1992); *Ball v. E.W. Scripps Co.*, 801 S.W. 2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991); *DiSalle v. P.G. Publishing Co.*, 544 A.2d 1345 (Pa. Super. Ct. 1988), *cert. denied*, 492 U.S. 906 (1989); *Stickney v. Chester County Comms., Ltd.*, 522 A.2d 66 (Pa. Super. Ct. 1987); *News Publishing Co. v. DeBerry*, 321 S.E. 2d 112 (Ga. Ct. App. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Newson v. Henry*, 443 So.2d 817 (Miss. 1983); *Williamson v. Lucas*, 304 S.E. 2d 412 (Ga. Ct. App. 1983); *Embrey v. Holly*, 442 A.2d 966 (Md. 1982).

test has been previously and emphatically rejected by the Court as inconsistent with the very First Amendment values that require a heightened fault standard in public figure and public official libel cases. As Justice White observed in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968):

> Concededly the [actual malice] standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. . . . We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

Accord Harte-Hanks, 491 U.S. at 666 ("there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule").

This Court has frequently held that, under the doctrine of stare decisis, the overruling of constitutional precedent "demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1992). Petitioner has offered no reason remotely sufficient to warrant the extraordinary step of discarding the actual malice standard in limited purpose public figure cases and, with it, three decades of settled First Amendment jurisprudence.

II. BY REASON OF THE FIRST CIRCUIT'S FACTUAL FINDING THAT GRAY REMAINED A PUBLIC FIGURE AT THE CENTER OF AN ONGOING CONTROVERSY AT THE TIME OF THE BOOK'S PUBLICATION, THE LEGAL ISSUE OF WHETHER A PUBLIC FIGURE'S STATUS SHOULD LAPSE AFTER A PROLONGED PERIOD OF OBSCURITY IS NOT PRESENTED FOR REVIEW

Petitioner also asks this Court to grant certiorari to determine whether public figure status (and the corresponding need to show actual malice) should lapse in those cases where a libel plaintiff is no longer in the public eye at the time of the challenged publication. Pet. at 13. Certiorari should be denied since Petitioner is seeking to have the Court address a hypothetical question that was not reached by the courts below and that is not presented by the record in this action. The First Circuit found that, on the facts of *this* case, Petitioner remained an active public figure involved in a current controversy at the time of the Book's publication in 1992 — a finding that obviated any need to address or reach the "passage of time" issue. The question is, therefore, not presented for review by this Court.

In his brief on appeal to the First Circuit, Petitioner argued that, even if he had been a limited purpose public figure through 1986, he was no longer "the focus of media attention" when the Book was published in 1992 and, therefore, had lost his public figure status. Plaintiff-Appellant's Brief at 27-29. Rejecting the factual premise of this argument, the First Circuit found that "prior to *and continuing up to the book's publication[,]* . . . a public controversy existed as to the methods and influence of lobbyists." Ct. App. Op. at 11a (emphasis added). In fact, when the Book was published in July 1992, the ongoing

controversy over lobbyists was one of the central issues in the 1992 presidential election, with Ross Perot's calls for curbs on lobbyists the centerpiece of his campaign.[19] The First Circuit further found that, far from receding into obscurity, "Gray was a central figure in this controversy" and that "numerous articles concerning Gray, his company, and Hill and Knowlton [were] published between 1986 and 1992." Ct. App. Op. at 12a and n.3.[20] The record revealed no fewer than 188 articles mentioning or quoting Gray between 1986 and 1992, including, for example, a January 1992 *Newsweek* article in which Gray publicly touted the integrity of his company's billing practices — the *very* subject of Statement (c).[21] Because the First Circuit rejected Petitioner's contention that he was no longer in the public eye at the time of the Book's publication, the court did not reach (or express any view on) the legal question of whether — if Petitioner had been out of the limelight after 1986 — the passage of time would have caused his limited public figure status to lapse.

In his Petition, Gray does not challenge the First Circuit's factual determination that he remained at the center of an ongoing public controversy in 1992, perhaps because he realizes that certiorari is "rarely granted when the asserted error consists of erroneous factual findings."

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19. *See* A 16, Docket No. 100, Reply Affidavit of William Chapman, dated August 6, 1997, Exs. A, B, C and D.

20. Similarly, the Book itself reported on several well-publicized controversies involving Petitioner and his companies between 1986 and 1992, including, for example, Petitioner's lobbying and public relations efforts on behalf of the Kuwaiti Government in 1990 just prior to the Gulf War. Book at 327-394.

21. A 454, *Newsweek*, Jan. 13, 1992 ("I'd have the best employee's head if I found him dumping hours on a client with no work").

Supreme Court Rule 10. Rather, in what amounts to a request for an advisory ruling, he seeks certiorari on the "passage of time" issue to "resolve an unsettled area of law." Pet. at 17. Just as it was unnecessary for the First Circuit to reach this legal issue in light of its factual finding that Gray remained in the spotlight in 1992, it is equally unnecessary for this Court to decide in *this* case whether there is a temporal component to the limited public figure analysis. In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979), for example, this Court specifically declined to address whether a public figure "may lose that status by the passage of time" in light of its determination that the plaintiff had never been a public figure in the first place. The factual situation presented here is the opposite of *Wolston*, but the same reasoning applies: because Petitioner was a "central figure" in a public controversy that continued "up to the book's publication" (Ct. App. Op. at 12a, 11a), this Court need not and should not address the question of whether a public figure may lose that status where — unlike here — he has lapsed into obscurity.

Not only did the First Circuit not reach the issue of whether a "public figure temporal component" exists, it gave no indication of how it might rule were the issue squarely before it.[22] The absence of any legal analysis on the "temporal component" issue by the First Circuit provides a further reason to deny certiorari, namely, the issue is not "sufficiently developed" in this case for this Court to "assess" it. *Roberts v. Galen of Va.*, 525 U.S. 249, 252 (1999) (declining to address respondent's alternative grounds for affirmance because "these claims do not appear

22. While Petitioner seems to assume that the First Circuit would not recognize a "temporal component" to the limited public figure analysis, a recent First Circuit opinion suggested, without deciding, that "there may be a temporal dimension" in some circumstances. *Pendleton v. City of Haverhill*, 156 F.3d 57, 70 (1st Cir. 1998).

to have been sufficiently developed below for us to assess them"); *see also National Colegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below" even though respondent had raised the issues in its Third Circuit brief).[23]

Finally, even if it were true — as it is not — that Petitioner had faded into obscurity after 1986, the facts of this case provide a particularly inappropriate basis for this Court to address the issue of whether there should be a temporal component to the limited purpose public figure analysis. Even under Petitioner's version of the facts, only six years would have passed between 1986 and the publication of the Book in 1992. This is far less than the 16-year gap in *Wolston* that led the two concurring Justices to endorse the passage-of-time argument, let alone the 40-year gap in *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981). But more importantly, the record establishes that Petitioner continued to have effective and easy access to the media after 1986 and continued to assume the risk of public scrutiny by repeatedly granting press interviews and aggressively defending the role of lobbyists. A 360-373. This is not the situation addressed in the *Wolston* concurrence that emphasized the plaintiff's "conscious efforts to regain anonymity during the succeeding 16 years." *Wolston*, 443 U.S. at 171 (Blackmun, J., concurring). Even if this Court wished to address the legal question of whether a public figure loses that status by the passage of time, the

23. Although the "passage of time" question is not presented for review in this case, Respondents believe that once a person is classified as a limited purpose public figure in connection with a controversy, public figure status should continue for future discussion of that controversy so as to protect later commentary on the very events that made the person a public figure. "The press needs sufficient breathing room to compose the first rough draft of history and the historian needs the same protections when he writes the second or third draft." *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1236 (6th Cir. 1981).

appropriate context for doing so would be a case in which a public figure has, in fact, gone into a prolonged period of obscurity prior to the time of the challenged publication. This is not that case.

III. PETITIONER'S ASSERTION THAT THE FIRST CIRCUIT MISAPPLIED A PROPERLY STATED RULE OF LAW TO STATEMENT (b) DOES NOT WARRANT CERTIORARI AND, IN ANY EVENT, IS WITHOUT MERIT

Petitioner finally contends that certiorari should be granted to review the First Circuit's determination that Statement (b) was not provably false, claiming that the First Circuit misapplied the rule set forth in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Pet. at 17-21.[24] Petitioner seeks certiorari *solely* on the ground that, while the First Circuit stated the correct rule of law, it misapplied that rule to the facts of this case. Pet. at 20. This argument does not warrant review because certiorari is "rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." Supreme Court Rule 10. Additionally, even beyond this prudential restriction on the Court's jurisdiction, certiorari should be denied since the record shows that the First Circuit properly applied *Milkovich* in concluding that Statement (b) was not provably false.

Petitioner concedes that, in analyzing Statement (b), the First Circuit correctly stated the rule laid down by *Milkovich:* "that only statements that present or imply the existence of facts that can be proven true or false are actionable under state defamation law." Ct. App. Op. at 4a (citing *Milkovich*, 497 U.S. at 18-20); Pet. at 18. Petitioner further acknowledges that, in making the determination of whether Statement (b) "can be proven true or false," the First Circuit correctly

24. Statement (b) reads: "A senior Gray and Company executive insisted that Gray's closeness to the President and others was often faked. 'He completely faked his closeness with a number of senior administration officials.' " Pet. at 18a.

"recognized" that *Milkovich* required the court to "evaluate the tenor of the speaker's statement and the overall context in which it was given." Pet. at 20, 4.

Nevertheless, Petitioner contends that "both the lower courts parsed Statement (b) to isolate two words contained in it, and ignored Statement (b)'s overall tenor and context." Pet. at 20. Petitioner claims that the First Circuit did not consider Statement (b) in the context of "Chapter 8 of the Book, which details facts concerning the start up of Gray & Co. and the social aspects of the business." *Id.*

Petitioner's contentions are without foundation. The First Circuit carefully weighed both the tenor and context of Statement (b) in its analysis of whether that passage contained a statement of objectively verifiable fact.

As mandated by *Milkovich*, the First Circuit expressly considered the tenor of Statement (b), namely, whether "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts." Ct. App. Op. at 5a (quoting *Haynes v. Alfred A. Knopf*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

It is equally clear that, contrary to Petitioner's assertion, the First Circuit did, in fact, examine Statement (b) within the context of both Chapter 8 — which detailed Petitioner's friendship with many senior officials in the Reagan administration — as well as the rest of the Book. The First Circuit explicitly stated that whether "calling something a 'fake' is or is not protected opinion depends very much on what is meant and therefore on context." Ct. App. Op. at 6a. The First Circuit then went on to examine the various meanings of "fake," noting that it can be an assertion of fact or opinion depending on the setting in which it is used. *Id.* Based on its careful analysis of both the tenor and context of Statement (b), the First Circuit correctly concluded that Statement (b) could not be read as

a factual assertion that Petitioner "did not in fact know" President Reagan or other high administration officials. *Id.* Rather, "the book made quite clear that Gray did have contacts at the highest levels; the word 'fake' was used to imply that Gray was exaggerating his 'closeness.' " *Id.*[25] Accordingly, the First Circuit held that Statement (b) was merely the speaker's subjective view that Petitioner tended to overemphasize the *degree* of his "closeness" with President Reagan and others, a "subjective judgment" the court properly held was too "vague" to be capable of verification. *Id.* Indeed, Chapter 8 contains differing opinions from at least four or five lobbyists and White House officials regarding how "close" Gray was with the President and his top advisors. Book at 153-157.[26]

Given that the First Circuit stated the correct rule of law in faithfully following *Milkovich* and properly applied that rule of law to Statement (b), there is no justification for granting certiorari.

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25. Less than two pages before Statement (b), Trento wrote in Chapter 8 that "Gray was friends with Ronald Reagan, Ed Meese, Cap Weinberger, Richard Schweiker, Charles Wick and others in the administration." Book at 154. She then went on to describe Petitioner's friendly relations with each of several senior Reagan administration officials. Additional details about Petitioner's personal friendship with President Reagan, Ed Meese, William Casey (then head of the CIA) and other top level officials were also provided elsewhere in the Book. *E.g.*, Book at 30, 68, 134-35, 168, 177, 340-46 (describing Gray's 25 year relationship with President Reagan).

26. The lower courts' conclusion, that, in context, Statement (b) was not an objectively verifiable statement of fact can be contrasted with the district court's holding that Statement (d) (Gray "fabricated" calls with White House officials to impress visitors) must go to the jury as a statement of fact. Whether Gray fabricated non-existent calls with White House officials is capable of being proven true or false; whether Gray overemphasized how "close" he was with those officials is not and, indeed, is inherently subjective.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

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